SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 10

ALDEN WHITMAN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 14, 1961

[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,416

ALDEN WHITMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Messrs. Thurman Arnold and *Gerhard P. Van Arkel*, with whom *Mr. George Kaufmann* was on the brief, for appellant. *Mr. David I. Shapiro* also entered an appearance for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Carl W. Belcher*, Assistant United States Attorney, and *Miss Doris H. Spangenburg*, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

OPINION—Decided July 7, 1960

PER CURIAM: Alden Whitman, a copy reader on the New York Times, was found guilty on all 19 counts of an indictment charging him with refusing to answer cer-
[fol. 2] tain questions put to him by the Senate Internal Security Subcommittee,[1] and was given a suspended

[1] Violations of 2 U. S. C. § 192, which is:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry

sentence of imprisonment for six months and a fine of $500. He appeals.

Whitman presents five arguments for reversal: (1) The scope of the topic under inquiry by the Subcommittee was too broad and indefinite to illuminate the pertinency of the questions in the indictment; (2) the questions in the indictment are not pertinent to any authorized inquiry since they concern Communist Party associations during a remote period when the conspiratorial character of the Party was obscure; (3) any question about associates in the Communist Party, as distinguished from one's own Party activities, lacks pertinency; (4) even if the questions were pertinent, Whitman's personal interest, under the First Amendment, in following the dictates of his conscience overbalanced the interest of Congress in exposure of Communist Party members; and (5) the Subcommittee's inquiry was devoted to investigating the New York Times, and thus invaded the field of freedom of the press.

Insofar as the subject under inquiry is concerned, the questioning of Whitman was substantially similar to that [fol. 3] of the appellants in No. 13,737, *Shelton* v. *United States*, and No. 13,925, *Price* v. *United States*, both decided by this court on June 18, 1960. In light of those decisions, the claims covered by the first and fifth contentions must be rejected. And in view of the decision in No. 13,694, *Deutch* v. *United States*, also decided on June 18, 1960, the third and fourth contentions cannot be a basis for reversal.

As to appellant's second claim, we note that at least half of the indictment questions, those in counts one through eight, referred to the Communist Party in the

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before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. (R. S. § 102; June 22, 1938, ch. 594, 52 Stat. 942.)"

post World War II period prior to 1949. It was at that time that Whitman himself, according to his own offer of testimony at trial, became especially conscious of the questionable character of the Party. Moreover, one of the questions—"Did you tell anyone you were quitting the Party?"—clearly pertained to the mechanics of Party membership at a time not so distant as to be irrelevant to possible present practices. Given the presently considered conspiratorial nature of the Party, a common belief of which Whitman does not claim ignorance, it would seem that the questions in counts one through eight were clearly pertinent to an investigation of subversive activities as manifested by the organization of members of the press into Communist Party cells in the period following World War II, and such an inquiry was not without relevance to Party activities in 1956, when the Subcommittee questioned Whitman.

Affirmed.

[fol. 4] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959.

No. 15,416

Criminal 1213-56

ALDEN WHITMAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
for the District of Columbia

Before: Wilbur K. Miller, Washington and Bastian, Circuit Judges.

JUDGMENT—July 7, 1960

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: July 7, 1960

[fol. 5] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 6]

SUPREME COURT OF THE UNITED STATES

No. 300—October Term, 1960

ALDEN WHITMAN, Petitioner,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—June 19, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 239.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Brennan took no part in the consideration or decision of this application.

[fol. 7]

SUPREME COURT OF THE UNITED STATES

No. 10—October Term, 1961

ALDEN WHITMAN, Petitioner,

vs.

UNITED STATES

ORDER GRANTING MOTION TO DISPENSE WITH PRINTING OF RECORD—October 9, 1961

On Consideration of the motion of petitioner to dispense with printing the record,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Brennan took no part in the consideration or decision of this motion.

ILE COPY

No. 10

Supreme Court, U.S.
FILED
AUG 5 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

ALDEN WHITMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated August 5, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ALDEN WHITMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Alden Whitman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals has not yet been reported. It is printed in Appendix A, *infra,* pp. 1a to 3a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May a witness, who has fully and freely answered all questions put to him concerning his admitted past membership in the Communist Party, refuse, under the First Amendment to the Constitution, to answer questions concerning his associates in long past lawful political activity?

2. Did S. Res. 366, 81st Cong. 2d Sess. Validly authorize the hearing and the questions which petitioner declined to answer?

3. Is an indictment under 2 U.S.C. 192 sufficient, under Rule 7(c), Federal Rules of Criminal Procedure, which fails to state the authority of the Committee, what the question under inquiry was, and how the questions asked the witness were pertinent to the question under inquiry?

4. May a witness be convicted for failure to answer questions about his associates in past lawful political activities, when the Committee fails to reveal to him either the source of its authority or the pertinency of the questions?

5. In judging the pertinency of questions which invade an area to which the First Amendment applies, is it proper to use as a standard whether the question "clearly pertains" to a subject matter "not so distant as to be irrelevant to possible present practices"?

CONSTITUTIONAL PROVISIONS AND STATUTORY MATERIALS INVOLVED

This case raises questions under the First and Fifth Amendments to the United States Constitution and 2 U.S.C. 192, Senate Resolution 366, 81st Cong., 2d Sess. and Rule 7(c), Federal Rules of Criminal Procedure. These provisions are all reprinted in Appendix "B", *infra*.

STATEMENT OF THE CASE

A. THE COMMITTEE PROCEEDINGS

Petitioner, Alden Whitman, has been a copy reader on the New York Times since 1951. (J.A. 42) On January 6, 1956, he was questioned by the Internal Security Sub-committee of the Judiciary Committee of the United States Senate. It is his refusal to answer

questions concerning the identity of his associates while he was a member of the Communist Party on which the nineteen counts of the indictment in this case are based.

The series of open hearings at which petitioner testified (hereafter called the "hearings") ran from January 4-6.[1] Fourteen of the eighteen witnesses were either past or present employees of the New York Times.[2] Both the scope of the hearings and the broad question under inquiry was the investigation of communism in general "wherever we find it" (Hearings 1587). This general topic was not made known to petitioner at the time of his appearance or subsequently, although he was questioned about his specific association with the Communist Party during a period of thirteen years. The hearings were denominated "Strategy and Tactics of World Communism (Communist activity in New York)" (Hearings, Title Page). The Chairman, in calling the Committee to order on January 4th noted that the hearings were the result of the testimony of Mr. Winston M. Burdette, a newspaper man and broadcaster, who had been a Communist from 1937 to 1940 "and had rendered a patriotic service by disclosing to the Sub-committee the names of the men and women whom he knew as members of the Communist Party". (Hearings, p. 1587) Therefore, the Chairman stated, it was the duty of the Committee "to pursue every lead which develops out of the Bur-

[1] The record of those hearings was introduced as Government Exhibit 8 at the trial. It will be cited herein as "Hearings".

[2] Four of the New York Times' witnesses were subsequently indicted for contempt of Congress. One was acquitted. *U. S.* v. *Peck*, 154 F. Supp. 603 (DDC, 1957). The others were convicted and their convictions were affirmed by the Court below. *Shelton* v. *U. S.*, — F. 2d — (No. 13737, App. D.C.), *Pet. for Cert. pending*, No. 246, Oct. Term 1960; *Price* v. *U. S.*, — F. 2d — (No. 13925, App. D.C.).

dette testimony" (*Id.*), which mainly related to newspapers. The Chairman also stated "We are not . . . investigating any newspaper or group of newspapers. we are simply investigating Communism wherever we find it" (*Id.*, 1588). Senator Hennings, on the other hand, said "the Committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency". (*Id.*)

Petitioner was not present on January 4, and heard neither of these statements. When he appeared he was not advised of the legislative purpose for which his testimony was required. Resolution 366, from which the subcommittee claimed to derive authority, did not inform Whitman of any narrower topic than Communism on a broad front.[3] The committee's explanations of individual questions pointed in conflicting directions. (Hearings 1730, 1737, 1738.)

Whitman testified that he had been a member of the Party from 1935 to 1948,—about 13 years. During the last seven of those years (1941 to 1948) he had been successively employed by the Buffalo Evening News and by the New York Herald Tribune. But the questions were not confined to the period Whitman was employed by newspapers. Prior to entering the newspaper field (from 1935 to 1941) appellant had been employed in minor capacities by the following organizations: (1) The National Committee for the People's Rights, (2) research for an undisclosed individual on a book, (3) The North American Committee to Aid

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[3] Resolution 366 is reprinted at Appendix B, page 5a, *infra*. Point 1 of the authority is plainly inapplicable to petitioner's appearance, since none of the questions asked referred to events subsequent to the passage of the Internal Security Act of 1950. Point 2 is also inapplicable because petitioner was asked no questions regarding espionage, sabotage, etc. This leaves only Point 3 which is a broad, general charter to investigate communism in general.

Spanish Democracy, (4) Films for Democracy, (5) Veterans for Democracy, (6) TASS, the Russian news agency, (7) the New York Peace Committee, and (8) the American Committee for the Protection of Foreign Born. Nine of the nineteen counts of the indictment relate to appellant's association with the above organizations. With the exception of TASS, they had nothing to do with newspapers. The period covered by the questions went back sixteen years prior to the Committee hearings.

Furthermore, the nature of the questions asked appellant makes it clear that the Committee was not interested in Whitman's own activities as a Communist either before or after his newspaper career. He was asked no questions whatever as to his Party activities. The committee did not challenge Whitman's statement that his own activities in the Party had been entirely innocent and that he himself had never taken part in any conspiracy against the Government. It sought no information on what Whitman did at Communist meetings or pursuant to Party orders or policy. It sought to know only who Whitman's friends and associates were. In the same way, in connection with the eight positions which Whitman held from 1935 to 1941, prior to his newspaper experience, Whitman was never examined as to his Party activities but only with respect to his associates.

At all times Whitman indicated complete willingness to disclose his own conduct in the Party but he was never asked about it. His refusal to answer as to his associates was based primarily upon his conscientious and constitutional objection against being cast in the role of an informer. But his statement to the Committee justifying his refusal to answer also explicitly

put into question the authority of the subcommittee, the legislative purpose of the inquiry, and the pertinency of the questions asked him. Hearings 1733. Nevertheless, he was never vouchsafed an explanation on any of these points.

B. THE PROCEEDINGS BELOW

1. District Court

Petitioner was indicted in the District Court for the District of Columbia on nineteen counts under 2 U.S.C. § 192 for failure to answer questions at the January 6 hearing. The indictment (J.A.* 4-6) alleges that the subcommittee hearings were held "pursuant to the Legislative Reorganization Act of 1946, Section 102(1)(k), 60 Stat. 818 and to Senate Resolutions 366 of the 81st Congress and 58 of the 84 Congress, and to the Standing Rules of the Senate." It further alleged that defendant "appeared as a witness before that subcommittee . . . and was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions."

Petitioner moved to dismiss the indictment on four grounds: 1) It fails to allege any grant of authority to the subcommittee from the Committee on the Judiciary which authorized "the said Subcommittee to question the defendant on the matters set out in Counts One through Nineteen," or to "state the nature and scope of any such authority." 2) It fails to allege that the inquiry made of the defendant was within the scope of the Subcommittee's authority. 3) "It fails to state what was 'the Question then under inquiry' to which

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* Record references are to the Joint Appendix in the Court of Appeals.

the questions addressed to the defendant are alleged to be pertinent." 4) The indictment is void and illegal because the jury was biased by reason of the facts stated in an affidavit by defendant's counsel. (That the majority of its members were government employees subject to employee loyalty security programs). (J.A. 6-7). The District Court (McLaughlin, J.) denied the motion to dismiss. (J.A. 7).

Petitioner was tried on April 8, 1957 before Curran, J. There were two witnesses, committee counsel Sourwine for the government, and the defendant in his own behalf. Sourwine explained that Whitman had been called because the "committee had information * * * that the Alden Whitman who had been active in the Communist Party in the mid-1930's was the same Alden Whitman who was then—* * * toward the end of 1955—employed in the news department of the New York Times" (J. A. 10), and that it had other information that Whitman had been an official of, or connected with, or employed by other organizations. (J.A. 10-12). In the course of Sourwine's testimony the entire transcript of Whitman's appearance of January 6 was placed into the record.

In an attempt to establish the authority of the subcommittee, the government introduced a minute (G. Ex. 3) of the Judiciary committee containing a resolution continuing the Internal Security Subcommittee, using the name of the subcommittee (J.A. 15). Pursuant to this committee resolution the Senate passed Resolution 58 (84th Cong.) appropriating money for the subcommittee. (*Id.*) On cross-examination Sourwine stated that the minute was not available to members of the public in general and had not been made known to Whitman when he appeared. (J.A. 20-22)

Sourwine also relied on the committee calendar, which does not constitute official action of the committee, and a letter from Sourwine to members of the Judiciary Committee, stating who would serve on the subcommittee. (J.A. 17-19). Sourwine stated further that he believed that the authority of the committee was not limited to investigating illegal actions of the witness or others, and "in pursuit of its objective of gathering information affecting the internal security of the United States, it could ask questions about and inquire into activities which were in themselves lawful." (J.A. 32). He added that "Belief sometimes becomes a matter into which you can properly inquire." (*Id.*)

With regard to the "question under inquiry" the government introduced the transcript of the hearings. Sourwine stated that he doubted whether he had asked any of the witnesses at the hearing whether they had been engaged in espionage, or sabotage, and that he rarely asked such questions. (J.A. 32-33) He added that "I sometimes think a question about communist membership is a question on the subject matter of the conspiracy to overthrow the government of the United States by force and violence." He stated that the fact that fourteen of the eighteen witnesses at the hearings were present or former employees of the New York Times "was not sheer accident." (J.A. 26).

Defendant Whitman took the stand in his own behalf. He testified fully about his background in the Communist Party and other organizations. (J.A. 38-43).

After objection had been sustained (J.A. 44-46), defendant offered to prove that "at no time did he become a member of the party with the objective of engaging in the forcible overthrow of the government by force or

violence or that it was at any time represented to him that this was one of the purposes of the party." (J.A. 46). He further offered to prove as follows: His own activities in the party consisted principally of attendance at public meetings (at which political problems were discussed, but not espionage, sabotage, etc.) and occasionally selling subscriptions to the Daily Worker. His membership in the party was not clandestine. Beginning in 1942 he worked during the evening hours and so became less active. His associates in the party, like himself, were not secret members, but were engaged in purely lawful political activities. In 1939 the Communist Party had adopted a constitution which provided in part that the party did not advocate overthrow of the government by force; it was regarded as a lawful political party by the general public, and there had been no judicial finding or legislation which characterized the party as an unlawful conspiracy. (J.A. 47-48) He also testified and offered to testify further about his leaving the party: After the war, it became clear to Whitman that the party would not become the basis of a broad labor party; it also became much more doctrinaire and there was less opportunity for free discussion. The immediate incident that led to his leaving the party was that he had been asked to serve on the grievance committee of the Newspaper Guild at the Herald-Tribune, which was incompatible politically with the party, because the Communist group in the Guild had refused to cooperate with the union's administration, a policy which Whitman "simply couldn't tolerate." (J.A. 50-51)

Finally Whitman stated that the reason for his refusal to disclose the identity of persons he had known in the party, was on conscientious grounds (J.A. 52-54).

A motion for acquittal was denied. (J.A. 37-38). After the defense rested, the Court found defendant Guilty on all counts. (J.A. 54-55) Subsequently the Court denied a motion for new trial and imposed a fine of $500 and a suspended sentence of six months imprisonment on defendant. (J.A. 59, 62).

2. Court of Appeals

Whitman appealed his conviction. At the time, eight other contempt of Congress cases were pending in the Court of Appeals. These eight cases were heard on various dates in February 1960, by a single panel of the Court. (Washington, Bastian, and Burger, Circuit Judges). Whitman's case was also heard that month, by another panel. (Miller, Washington and Bastian, Circuit Judges). On June 18, the other eight cases were decided. Thereafter on July 7, the Court of Appeals in a *per curiam* opinion affirmed Whitman's conviction. (Appendix A, pp. 1a-3a) The Court's opinion explicitly rejected Whitman's contention that the questions asked were not pertinent because they referred to a period before the Communist Party became a conspiracy. With respect to the other issues the Court of Appeals affirmed on the basis of its June 18 decisions in *Shelton* v. *United States* and *Price* v. *United States* (n. 2, *supra*) and *Deutch* v. *United States*, pending as #233 Oct. Term, 1960.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Question One. May a Witness, Who Has Fully and Freely Answered All Questions Put to Him Concerning His Admitted Past Membership in the Communist Party, Refuse, Under the First Amendment to the Constitution, to Answer Questions Concerning His Associates in Long Past Lawful Political Activity?

In *Barenblatt* v. *United States*, 360 U.S. 109, 115 this Court carefully refrained from deciding whether a witness may be compelled to disclose his associates in the Communist Party, or other "communist" organizations. The question left open in *Barenblatt* is squarely presented here, in a particularly compelling context. Petitioner freely and candidly answered all questions about his own membership, but refused to reveal the identity of other individuals who petitioner believed (and offered to prove at trial) had engaged solely in entirely lawful political activities. He expressly based his refusal on conscience and the principles of the First Amendment. He shunned the role of informer, and stood firm in the conviction that under our constitutional system no arm of government has power to compel disclosure about lawful political activity innocently engaged in many years earlier.

The distinction between compelling testimony about oneself and one's associates is substantial in terms of the very balance required by *Barenblatt*, 360 U.S. 109, 126-27. The Committee's claim that it may require testimony about others strikes at the very heart of the associational rights which are guaranteed by the First Amendment. The questions which appellant refused to answer were precisely as to the identity of the individuals with whom he associated. That compulsory revelation of all one's associations is likely to have

serious inhibiting effects on the act of association itself was authoritatively recognized in *NAACP* v. *Alabama*, 357 U.S. 449, 462:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Accord: *Watkins* v. *United States*, 354 U.S. 178, 197. *Bates* v. *Little Rock*, 361 U.S. 516, 523.

These considerations are entirely applicable here. That past or present membership in the Communist party, exposes individuals to "economic reprisal, loss of employment . . . and other manifestations of public hostility" is a matter of common knowledge and is reflected in decisions of this Court. *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg* v. *State Bar*, 353 U.S. 252 (1956); *Black* v. *Cutter Laboratories*, 351 U.S. 292; *Greene* v. *McElroy*, 360 U.S. 474 (1959). This is not a case where there is any suggestion that the conduct of petitioner and those individuals whose identity he refused to reveal was other than entirely innocent; petitioner's claim of privilege was based on this premise (J.A. 52-54).

Where a witness refuses to answer as to his own membership in the Communist Party, the refusal is in his own self-interest. Where he refuses to inform on his friends there can be no possible self-interest. He is risking a criminal penalty solely because his conscience tells him that he should not be a party to a scheme of exposure which will ruin persons whose association with Communism may have been entirely innocent.

The Court below decided this issue solely on the authority of its opinion in *Deutch* v. *U. S.* (now pending as #233 Oct. Term, 1960). The *Deutch* opinion had dealt with the issue quite summarily, placing exclusive and controlling reliance on *Barsky* v. *U. S.*, 167 F. 2d 241, *cert. denied*, 334 U.S. 843. But *Barsky* was decided long before this Court recognized a constitutional interest in nondisclosure. *Watkins* v. *U. S.*, *supra*; *N.A.A.C.P.* v. *Alabama*, *supra*; *Bates* v. *Little Rock*, *supra*. The Court below did not consider, in making the evaluation required by Barenblatt, the clear difference between questions relating to petitioner's own activities and questions compelling him to implicate others.

The question left open in *Barenblatt*, and raised here, is not only substantial, it is important. In light of the overriding interest which the Senate Internal Security subcommittee and the House Un-American Activities Committee have shown in compelling disclosure of past Communists, it is clear that Whitman and Deutch are not isolated cases. The dilemma of conscience which petitioner faced here may confront any non-voluntary witness before these committees.

If these witnesses can be compelled to reveal their associates they should know it; conversely, if the committee power does not extend that far, a decision by this Court should make it clear, both to keep the committees within constitutional bounds, and to relieve witnesses of the threat of contempt citation. The courts too, require further guidance on the application of the balancing approach, as the post-*Barenblatt* opinions of the court below make all too clear. The interest of this citizen to consideration by this Court on the merits of his courageous reliance on the First Amendment is itself a factor entitled to weight in passing on this petition.

B. THE JUDGMENT BELOW IS INCONSISTENT WITH THE CONTROLLING DECISIONS OF THIS COURT.

Question Two. Did S. Res. 366, 81st Cong. 2d Sess. Validly Authorize the Hearing and the Questions Which Petitioner Declined to Answer?

United States v. *Rumely*, 345 U.S. 41 held, and *Watkins* v. *United States*, 354 U.S. 178, 201 reaffirmed, the almost self-evident proposition that a witness may not be convicted of contempt before a Congressional committee for a refusal to answer unless the inquiry was authorized by the parent body. *Barenblatt* v. *United States*, 360 U.S. 109 did not disturb this holding; rather, it determined that the House Un-American Activities Committee was authorized to ask the questions which were the basis of the conviction. *Id.* at 116-123.

The subcommittee claims authority from the Senate under Senate Resolutions 366, 81st Cong. 2d Session (App. "B" *infra.*) and 58, 84th Cong. 2nd Sess. The latter is an appropriation resolution giving the Subcommittee the power to operate under Resolution 366, and is not an independent source of authority. As

shown earlier, p. 4 n. 3, *supra*, parts 1 and 2 of Resolution 366 cannot support the questions asked of petitioner. The issue is therefore whether Part 3 validly authorized the inquiry made of petitioner.

First, we submit that Part 3 lacks the specificity which *Watkins* requires in an authorizing resolution. We do not understand *Barenblatt* to eliminate this requirement; we read that case as holding that authorization may be established despite a vague resolution if other legislative materials show that Congress was aware that its general charter would be the basis of specific investigations such as the one in question. We believe that the materials cited for this purpose by the court below in its *Shelton* decision (which it followed here) cannot thus save Part 3, although we confess uncertainty as to the standard of clarity which such "legislative gloss" 360 U.S. at 121 must meet.

However, even if by reasoning akin to that in *Barenblatt*, Part 3 could be held to sustain some investigation, no such conclusion is possible in this case. For it is elementary that in order to determine whether Congress impliedly authorized the Committee to pursue any topic of inquiry one must first know what that topic is. Thus the reasoning of this issue in *Barenblatt* operated on the premise that Communist infiltration into the field of education was the topic under inquiry. 360 U.S. at 112, 121-22.

Analysis of this issue is frustrated at the outset, however, because the record leaves it entirely open to conjecture just what the topic under inquiry was. As shown in our Statement, there was evidence that the inquiry was into communism in general. But the

committee proceedings also permitted the inference that various lesser, mutually inconsistent subjects were the purpose of the investigation. Yet further views are expressed by representatives of the committee and the government at the trial (J.A. 26-27, 36-38).[4]

Thus, since the prosecution did not establish at the trial that any given subject was the topic under inquiry, it necessarily failed also to establish the authority of the committee to investigate that topic. Yet, even if a case can be said to have been made out for such a topic, none of the possible alternatives was a valid subject of inquiry under the First Amendment.

Not only did the government fail to establish that the subcommittee was undertaking a valid authorized inquiry when Whitman appeared, there is affirmative evidence in the record that the hearing was in fact never authorized by the subcommittee. Senator Hennings stated at the outset of the hearings that "the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings". (Hearings, p. 1588). Yet the rules of the committee require such a meeting.[5] *Cf. Vitarelli* v. *Seaton*, 359 U.S. 535. Thus, even if the chain of title from the Senate to the subcommittee was sufficient, the subcommittee itself never authorized these hearings. Particularly where a claim is made on so broad a charter, it is important that each investigation be authorized properly. *Cf. Watkins, supra* at 205. It should not

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[4] Contrast also the testimony given in *Shelton* (see pet. for cert. No. 246, Oct. Term, 1960, pp. 18-20); and *Peck* (Trial Tr. pp. 153-54; 212, Crim. No. 1214-56, D.D.C.)

[5] See Sourwine's testimony in *United States* v. *Shelton* (Trial Tr. 157; 159-60, Crim. No. 1215-56 (D.D.C.).

be necessary after the witnesses have been subpoenaed and appear, for one Senator to have to ask "if it is the purpose of this committee, that this is not in any sense an attack upon the free press of the United States." (Hearings, p. 1588).

Question Three. Is an Indictment Under 2 U.S.C. 192 Sufficient, Under Rule 7(c), Federal Rules of Criminal Procedure, Which Fails to State the Authority of the Committee, What the Question Under Inquiry Was, and How the Questions Asked the Witness Were Pertinent to the Question Under Inquiry?

The indictment on which Whitman was tried (J.A. 406) failed to allege that the inquiry was within the authority of the subcommittee (or the source of such authority), what the question under inquiry was, and how the questions which were the subject of the indictment were pertinent to that question. Since each of these elements is an essential fact constituting the offense charged under 2 U.S. § 192, the indictment was defective in three respects. U. S. Coast Amend. V Rule 7(c) Fed. R. Crim. Proc. *United States* v. *Cruikshank*, 92 U.S. 542.

With respect to the pleading of the committee's authority, *United States* v. *Lamont*, 236 F. 2d 312 (2 Cir. 1956) squarely holds that an indictment in this precise form is insufficient. This decision by a distinguished Court of Appeals is ample ground for review by this Court of that issue.

These same considerations apply also, of course, to the question under inquiry, by which pertinency must be tested. See *Sinclair* v. *United States*, 279 U.S. 263, 296-97. The policy of *Stirone* v. *United States*, 361 U.S. 212, that a defendant is entitled to have the grand jury consider all the elements of the offense before being tried is also frustrated by this open-ended indictment. This question is also pending in at least

three other cases. *Braden* v. *United States,* #54, Oct. Term, 1960, *cert. granted* 362 U.S. 960; *Russell* v. *United States,* #239, Oct. Term, 1960; *Shelton* v. *United States, supra.*

Question Four. May a Witness Be Convicted for Failure to Answer Questions About His Associates in Past Lawful Political Activities, When the Committee Fails to Reveal to Him Either the Source of Its Authority or the Pertinency of the Questions?

Watkins v. *United States,* 354 U.S. 178, 208-209 and 214-15, and *Scull* v. *Virginia,* 359 U.S. 344, 353, establish as a requirement of due process that a witness be given "a fair opportunity to determine whether he is within his rights in refusing to answer". 354 U.S. at 215. Essential to such a determination is that the subject under inquiry and the "connective reasoning whereby the precise questions asked relate to it" be made known to petitioner. The court below failed to follow these cases, relying on its *Shelton* opinion, which in turn rejected the identical contention on the authority of *Barenblatt.* But this case is like *Watkins,* not *Barenblatt,* for the following reasons:

Unlike Barenblatt, whose statement was taken as an understanding of the subject under inquiry, 360 U.S. at 124, Whitman expressed ignorance of the committee's legislative purpose and the pertinency of questions about his association to any valid inquiry. (Ex. 7, par. 2, 3 in Hearings, p. 1733) If this statement suggests any opinion as to the subject of inquiry it would be "the beliefs, associations and activities of individuals connected with the press" (*Id.* par. 5), the one subject which the committee staunchly repudiated in his presence (Hearings, p. 1730) and two days previously (*Id.* p. 1588). Again, unlike Barenblatt (360 U.S. at 124-25) Whitman was not the beneficiary

of any explanation at the outset of the hearing. Rather, as we have seen, the only explanations he was afforded were inconsistent. (See p. 4, *supra*). Nor was Whitman advised why he had been called. And most important, unlike Barenblatt (360 U.S. at 125), Whitman answered all questions about his own Party membership and limited his refusal to his associations—whose pertinency remains in doubt even now. In view of all the obscurity which we have shown persists even after trial and appeal, it cannot be said that the subject matter under inquiry "has been made to appear with undisputable clarity" as the Fifth Amendment requires. *Watkins, supra,* 354 U.S. at 214.

The *Watkins-Scull* principle also seems to require that the witness be made aware of the authority of the committee to ask the questions and that he be given fair opportunity to evaluate whether he has a First Amendment right not to answer. Yet, for reasons stated earlier, a witness who does not know the legislative purpose can not determine either of these questions. We respectfully submit also, that even where the legislative purpose and the pertinency of the individual question are clear, a witness will be hard-pressed to make the balancing judgment which *Barenblatt* requires.

As to all but one of the questions which are the subject of the indictment, the defendant's refusal to answer is conceded. Since one count would, under *Barenblatt,* 360 U.S. at 115, be sufficient to sustain this conviction we would allow the matter to pass in this petition, if the sole exception were not the precise question on which the court below relied most heavily in determining that pertinency had been established. (App. "A" p. 3a) We refer here to Count 8 of the

indictment. The colloquy at the hearing on this Count was as follows:

> "Mr. SOURWINE. Did you tell anyone you were quitting the party?
>
> (Consultation between witness and his counsel.)
>
> "Mr. WHITMAN. I decline to answer that one, sir, on the basis of privileged communication between me and my wife.
>
> "The CHAIRMAN. I order and direct you to answer the question.
>
> "Mr. WHITMAN. I decline, sir, on those grounds.
>
> "Mr. SOURWINE. Other than your wife, did you tell any person that you were quitting the Communist Party at the time that you say you did quit?
>
> (Consultation between witness and his counsel.)
>
> "Mr. WHITMAN. I have no precise recollection on that score." (Hearings, pp. 1745-6)

We urge that this dialogue taken as a whole provided the committee with the answer to its question "Did you tell anyone you were quitting the party" which is the subject of Count Eight. Only one determined *not* to be answered could fail to interpret Whitman's responses as "Yes, I told my wife, but I don't remember whether I told anyone else." In view of the way the original question was phrased, the claim of the husband-wife privilege unless petitioner had in fact told his wife would require an incredible subtlety. As the direction to answer was immediately followed by the question as to whether petitioner had told anyone other than his wife (to which he gave as much of an answer as his recollection permitted) petitioner had at least as much right to assume that his substantial claim of

privilege (See *Wolfle* v. *United States*, 291 U.S. 7) had been accepted as had petitioner in *Quinn* v. *United States*, 349 U.S. 155, 166. Surely, in light of this entire colloquy it cannot be said that petitioner was confronted on this question "with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt." *Id.*, cited with approval in *Flaxer* v. *United States*, 358 U.S. 147, 151, where this Court unanimously reversed because of ambiguity in direction, although the committee never got what "it was plain it wanted." *Id.* Finally, it is clear that under the interpretation which the court below placed on the Count 8 question,[6] petitioner withheld nothing pertinent from the committee. It will hardly be contended that the question "Did you tell your wife that you were quitting the party" (which is the most that remained unanswered) "clearly pertained to the mechanics of Party membership."

Question Five. In Judging the Pertinency of Questions Which Invade an Area to Which the First Amendment Applies, Is It Proper to Use as a Standard Whether the Question "Clearly Pertains" to a Subject Matter "Not So Distant as to be Irrelevant to Possible Present Practices"?

The opinion of the Court below stated that the appropriate test of pertinency is whether the question "clearly pertained" to a subject matter "*not* so distant as to be *irrelevant* to *possible* present practices" (emphasis supplied); or whether the question was "clearly pertinent" to "an investigation . . . not without relevance" to the basic issues. If it be true that lawyers are experts in the relevant, any such standard is meaningless. It is in conflict with what we believe to be

[6] In the Trial Court the government contended for a different ground of pertinency (J.A. 37-38).

the correct rule enunciated by Chief Judge Biggs in *United States* v. *Orman*, 207 F. 2d 148, 158, that

> "The individual must rely, for the protection of his privacy' upon the requirement of pertinency discussed above. When an investigation enters a field to which the First Amendment is applicable, courts will be particularly careful to check unlawful lines of inquiry".

This investigation clearly entered "a field to which the First Amendment was applicable". It asked questions about purely lawful political activities and associations; the inquiry revolved about the "New York Times" and its staff; and related to a period of from 8 to 23 years before the hearing. In view of the changes in the objectives and nature of the Communist Party, this remoteness in time is peculiarly critical on the issue of pertinency. *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 244 and J.A. 46-47.

It may well be doubted whether raking over the dead embers of past lawful political activities could ever be relevant to any inquiry. Certainly it can shed no light on any present meaningful legislative proposal.

The Court below did not use its powers to "check unlawful lines of inquiry". It discarded the rule that pertinency, like any other element of the crime must be proven beyond a reasonable doubt. *Sinclair* v. *United States, supra.* It adopted instead a rule that if the question is "not irrelevant" to "possible present practice" it thereby becomes pertinent. This, we suggest, vitiates the entire purpose of the pertinency requirement.

CONCLUSION

Petitioner was subpoenaed to appear before the Internal Security Subcommittee of the Senate Judiciary Committee. He answered all questions about himself, admitting his own membership in the Com-

munist Party and other related conduct. He refused, however, to reveal the identity of his associates in lawful political activity, many years earlier. He knew that exposure "would be terrible trouble on the shoulders, on the heads of people who were as innocent as I of any wrongdoing." He felt that it would be "a mean and ignoble thing if I would be the vector, the agent to bring destruction on people." This case thus presents poignantly and directly a question which this Court has left open, whether the First Amendment's protection of lawful speech and assembly extends to a citizen whose conscience does not permit him to inform against his former political associates. This question, presented also in #233, *Deutch* v. *United States*, most emphatically merits decision by this Court.

Certiorari should be granted also because conviction on this record would be inconsistent with the applicable decisions of this Court. Though the committee's authority to ask the questions is an almost self-evident prerequisite of its contempt power, that authority was never proven. The resolution under which it claimed to operate lacked the precision which *Watkins, supra*, required. The power to ask the individual questions also could not be established because their legislative purpose remains a mystery even now. The record is replete with ambiguities and inconsistencies about "the question under inquiry"; the confusion is compounded by the positions taken by committees, government counsel and the lower courts in other cases arising out of the same hearings, two of which will also be before this Court. *Shelton* v. *United States, supra; Price* v. *United States, supra.* For the same reason, the due process requirement that the pertinency of a question be made clear to the witness at the hearing was not met in any of these three cases. The allegations

of the indictment were insufficient to state an offense, in direct conflict with a decision of the Second Circuit, and contrary to a long-established principle reaffirmed at the last Term here. The courts below applied a pertinency test which differs sharply from that of the Third Circuit, and which indeed renders meaningless this well-settled requirement for a contempt conviction.

Finally, these questions arise in the context of a hearing seemingly directed at a single great newspaper, raising the suspicion, which the committee's self-serving declarations will not allay, that freedom of the press, as well as the rights of conscience and association of the citizen, hangs in the balance.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Dated August 5, 1960

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,416

ALDEN WHITMAN, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the District of Columbia

Decided July 7, 1960

Messrs. Thurman Arnold and *Gerhard P. Van Arkel*, with whom *Mr. George Kaufmann* was on the brief, for appellant. *Mr. David I. Shapiro* also entered an appearance for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Carl W. Belcher*, Assistant United States Attorney, and *Miss Doris H. Spangenburg*, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: Alden Whitman, a copy reader on the New York Times, was found guilty on all 19 counts of an indictment charging him with refusing to answer certain questions put to him by the Senate Internal Security Subcom-

mittee,[1] and was given a suspended sentence of imprisonment for six months and a fine of $500. He appeals.

Whitman presents five arguments for reversal: (1) The scope of the topic under inquiry by the Subcommittee was too broad and indefinite to illuminate the pertinency of the questions in the indictment; (2) the questions in the indictment are not pertinent to any authorized inquiry since they concern Communist Party associations during a remote period when the conspiratorial character of the Party was obscure; (3) any question about associates in the Communist Party, as distinguished from one's own Party activities, lacks pertinency; (4) even if the questions were pertinent, Whitman's personal interest, under the First Amendment, in following the dictates of his conscience overbalanced the interest of Congress in exposure of Communist Party members; and (5) the Subcommittee's inquiry was devoted to investigating the New York Times, and thus invaded the field of freedom of the press.

Insofar as the subject under inquiry is concerned, the questioning of Whitman was substantially similar to that of the appellants in No. 13,737, *Shelton* v. *United States*, and No. 13,925, *Price* v. *United States*, both decided by this court on June 18, 1960. In light of those decisions, the claims covered by the first and fifth contentions must be rejected. And in view of the decision in No. 13,694,

---

[1] Violations of 2 U. S. C. § 192, which is:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. (R. S. § 102; June 22, 1938, ch. 594, 52 Stat. 942.)"

Deutch v. *United States*, also decided on June 18, 1960, the third and fourth contentions cannot be a basis for reversal.

As to appellant's second claim, we note that at least half of the indictment questions, those in counts one through eight, referred to the Communist Party in the post World War II period prior to 1949. It was at that time that Whitman himself, according to his own offer of testimony at trial, became especially conscious of the questionable character of the Party. Moreover, one of the questions—"Did you tell anyone you were quitting the Party?"—clearly pertained to the mechanics of Party membership at a time not so distant as to be irrelevant to possible present practices. Given the presently considered conspiratorial nature of the Party, a common belief of which Whitman does not claim ignorance, it would seem that the questions in counts one through eight were clearly pertinent to an investigation of subversive activities as manifested by the organization of members of the press into Communist Party cells in the period following World War II, and such an inquiry was not without relevance to Party activities in 1956, when the Subcommittee questioned Whitman.

Affirmed.

APPENDIX "B"

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"*Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

Rule 7(c) F.R. Crim. Proc. provides in pertinent part as follows:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 300

ALDEN WHITMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the district court is not reported. The opinion of the court of appeals (Pet. App. A, pp. 1a–3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1960. The petition for a writ of certiorari was filed on August 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366, 81st Congress, validly authorized the hearing and the questions which petitioner refused to answer.

2. Whether a witness, who was admittedly a member of the Communist Party during the period 1935 to 1948, may refuse on the basis of the First Amendment to answer a question as to his membership in a particular Party cell, as well as other questions as to his own activities and the activities of other Party members.

3. Whether the questions which petitioner refused to answer related to events that were too remote in point of time to be pertinent.

4. Whether the Subcommittee failed to apprise petitioner of the source of its authority and the pertinency of the questions.

5. Whether an indictment charging contempt of Congress must specify the subject under inquiry and the relationship of the questions to that subject.

STATUTE, RESOLUTION, AND RULE INVOLVED

2 U.S.C. 192, Senate Resolution 366, 81st Cong., 2d Sess., and Rule 7(c) of the Federal Rules of Criminal Procedure are set forth in Appendix B to the petition at pp. 4a–6a.

STATEMENT

The petitioner was charged in a nineteen-count indictment (J.A. 4–6), returned in the District Court for the District of Columbia, with having refused, in violation of 2 U.S.C. 192, to answer nineteen questions asked of him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary. Petitioner was found guilty by the court on all counts (J.A. 54–55) and was sentenced to serve six months' imprisonment, which was

suspended, and to pay a fine of $500 (J.A. 62–63). The judgment of the trial court was affirmed by the court of appeals (Pet. App. 1a–3a).

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, in the course of the Subcommittee's continuing investigation into "the strategy and tactics of world communism" (J.A. 37), Winston Burdett, a newspaperman and broadcaster, testified that he had been recruited into the Communist Party and that thereafter Party leaders had induced him to become a foreign correspondent for a major American newspaper and to use that position as a cover for military espionage for the Soviet Union (Tr. 173–174). On January 4, 1956, at the opening of the hearings at which petitioner appeared,[1] the Chairman of the Subcommittee announced that the present hearings "stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster" (Gov. Ex. 8, p. 1587).[2] The Chairman pointed out that "among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus car-

[1] At this same hearing, Robert Shelton, the petitioner in No. 946, this Term, pending on petition for certiorari, also refused to answer certain questions.

[2] Government Exhibit 8 is part 17 of the printed transcript of the Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 84th Cong., 2d Sess., January 4, 5, 6, 1956, entitled *Strategy and Tactics of World Communism (Communist Activity in New York)*.

rying on its psychological warfare against the United States and its institutions from inside by methods of penetration" (*ibid.*). Thereupon, Senator Hennings asked that it be "generally known and understood that this is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press" (*id.*, p. 1588). The Chairman agreed with this statement and then continued (*ibid.*):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

Petitioner testified two days later, on January 6. At the date of the issuance of his subpoena, on November 23, 1955, the Subcommittee had information to the effect that he had been active in the Communist Party in Connecticut in the mid-thirties; that he had been an official of the American Committee for the Protection of the Foreign Born, which organization had been cited by the Attorney General as subversive; that he had been an executive secretary of the New York Committee for the Protection of the Foreign Born, a related organization; that he had been connected with a magazine called "Science and Society", which was part of a scheme to recruit teachers from American universities and colleges into the Commu-

nist Party; and that he had been employed by TASS, the Soviet news agency, which the Subcommittee believed to be a cover for Soviet espionage (J.A. 9, 10–12).

Petitioner, a copyreader for the New York Times (Gov. Ex. 8, pp. 1728, 1729), testified that he was a member of the Communist Party from 1935 to approximately 1949, and that he belonged to Party cells in Bridgeport, Connecticut, where he joined the Party; Buffalo, New York; and New York City (*id.*, pp. 1730–1733, 1739, 1744–1745). When, however, he was asked to name the members of a cell to which he belonged in New York City, he declined to do so on the grounds that his private affairs, beliefs, and associations were not proper subjects for investigation; that their pertinence to any valid legislative purpose was in doubt; and that it was doubtful whether Congress had the right to investigate the press (*id.*, p. 1735). He disclaimed any reliance on the Fifth Amendment, relying instead on the First Amendment and the doctrine of separation of powers (*id.*, pp. 1734–1735).

Petitioner was told by the Chairman that the question was asked because the Subcommittee was investigating a Communist cell which it had reason to believe was active in New York City (*id.*, p. 1737). Petitioner was then directed to answer the question (*id.*, p. 1739). He again refused (*id.*, p. 1739), and this refusal constitutes the basis for count 1 of the indictment (J.A. 4).

On the basis of his original objections to the inquiry, petitioner declined to answer the questions

upon which the remaining counts in the indictment are predicated (J.A. 4–6).[3] He refused to state whether the cell was located at one of the major newspapers, on what newspaper he worked at the time he was a member of the cell, whether during all or part of the period from January 1943 to June 30, 1951, he was a member of a Communist cell composed of employees of the New York Herald Tribune where he was then employed, who were the members of the cell at the Herald Tribune, and whether any of the members of the cell were currently employed by the Tribune (Counts 3–7) (Gov. Ex. 8, pp. 1740–1744).

Petitioner testified that his first employment in New York in 1938 was with the National Committee for People's Rights (*id.*, pp. 1732, 1743). He was advised by the Subcommittee that in 1942 this organization had been cited by the Attorney General "as a Communist organization, substantially equivalent to the International Labor Defense, legal arm of the Communist Party" (*id.*, p. 1743). After working for this organization for two or three months, he did research on a book, but he refused to give the name of the book or to state for whom he did the research (Count 9) (*id.*, pp. 1745–1746). He also refused to state whether the book was published by a Communist publishing house or whether the person for whom he worked was known to him to be a Communist (Counts 10, 11) (*id.*, p. 1746).

Petitioner testified that for a period of eight weeks he was employed by the North American Committee to

[3] The only exception to his stated grounds for refusal was Count 8 (see *infra*, p. 9).

Aid the Spanish Democracy (*id.*, pp. 1746–1748), but he refused to state whether there were any persons in that organization known to him to be Communists (Count 12) (*id.*, p. 1747). He was then advised by the Subcommittee that in 1949 the North American Committee had been cited by the Attorney General as a Communist organization and by the House Committee on Un-American Activities as a Communist front (*ibid.*). He was further informed that it had received funds from the Communist Party of Massachusetts and from the International Workers Order and that its literature had been sold in Communist bookstores (*ibid.*). Petitioner persisted in his refusal to answer and further declined to name the person who paid him for working for that organization (Count 13) (*id.*, p. 1748).

Petitioner testified that he also worked for about two months as a press agent for Films for Democracy (*id.*, pp. 1748–49). He was told by counsel for the Subcommittee that, in March 1944, Films for Democracy had been cited as a Communist-front organization; that the Cinema Bureau in Moscow had laid down directives in 1939 concerning the building up of audiences for the purpose of agitating against films opposed to the current Communist Party line and supporting those that favored the line; and that, pursuant to that directive, Film Audiences, a Communist front, merged with Films for Democracy to form a new Communist front, Film Audiences for Democracy (*id.*, p. 1749). Petitioner declined to state whether there were any persons connected with Films for Democracy known to him to be Communists or

to disclose who paid him for his work (Counts 14, 15) (*id.*, pp. 1748–49).

After he left Films for Democracy, petitioner worked for several months for Veterans of Democracy as press agent and researcher for one of its officers who was speaking once a week over radio station WQXR (*id.*, pp. 1749–1750). He refused to answer whether any persons connected with that organization were known to him to be Communists or to name the officer for whom he worked (Counts 16, 17) (*id.*, p. 1750).

Petitioner testified that he had worked successively from the fall of 1939 to December 1941 for the Russian news agency, TASS, for the New York Peace Committee, and for the American Committee for the Protection of the Foreign Born (*id.*, pp. 1751–1752). He was told by the Subcommittee that the American Committee for the Protection of the Foreign Born had been cited by the Attorney General as subversive and Communist and that it was known as "one of the oldest auxiliaries of the Communist Party in the United States" (*id.*, pp. 1729, 1752). He declined to state whether any persons in the New York Peace Committee or the American Committee for the Protection of the Foreign Born were known to him to be Communists (Counts 18, 19) (*id.*, p. 1752).

From December 1941 to January 1943, petitioner worked for the Buffalo Evening News (*id.*, pp. 1728, 1753). He testified that he joined a Communist unit in Buffalo, but he refused to state who were the members of that unit (Count 2) (*id.*, pp. 1739, 1753). In January 1943, he returned to New York where he became a copy reader for the New York Herald Trib-

une (*id.*, p. 1753). He remained with the Tribune until the end of June 1951, when he began his present employment with the New York Times (*id.*, p. 1574).

Petitioner testified that he left the Communist Party in 1948 (*id.*, pp. 1730–1731, 1745). He could not recall writing a formal resignation but at about that time he stopped going to meetings and paying dues (*id.*, p. 1745). On the basis of privileged communications between himself and his wife, he declined to state whether he told anyone that he was quitting the Party (Count 8) (*ibid.*).

ARGUMENT

1. Petitioner argues (Pet. 14–17) that Congress did not authorize the Subcommittee to conduct the hearing or to ask the questions which he refused to answer. Senate Resolution 366, 81st Cong., 2d Sess. (see Pet. App. B, p. 5a), gives the Subcommittee the authority to investigate "the administration, operation, and enforcement of the Internal Security Act of 1950" and of "other laws relating to espionage, sabotage, and the protection of the internal security," and "the extent, nature, and effects of subversive activities in the United States," including Communist espionage, sabotage, and infiltration. We submit that this resolution adequately authorizes the investigation of Communist subversive activity in the press which is involved here. *Sacher* v. *United States*, 252 F. 2d 828, 832 (C.A. D.C.), reversed on other grounds, 356 U.S. 576.[4]

[4] Unlike the authorizing resolution of the House Committee on Un-American Activities criticized as vague and ambiguous in *Watkins* v. *United States*, 354 U.S. 178, 201–204, 209, S. Res. 366 uses no such terms as "un-American" or the "principle of

In any event, this Court held in *Barenblatt* v. *United States*, 360 U.S. 109, 117, that "[j]ust as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished by the course of congressional actions." On the basis of such a gloss, the Court upheld the authorizing resolution of the House Committee on Un-American Activities. The history of the Internal Security Subcommittee is equally persuasive that Congress authorized that Subcommittee to investigate Communist activity generally, including activity in so important an area as the press. The Subcommittee, founded in 1950 (S. Res. 366, 81st Cong., 2d Sess.), has from its beginning devoted a great proportion of its energies to the investigation of Communist activities including infiltration into the government and key industries, such as television, radio and the press; and it has held numerous hearings on legislative proposals to curb such activi-

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the form of government as guaranteed by our Constitution"; nor does its language suggest that the authority of the Subcommittee is limited to some particular aspect of Communist activity such as propaganda. Cf. 354 U.S. at 202. The term "subversive activities" in the third clause of S. Res. 366 is given content by the "including" phrase since "[t]he meaning of the general language [in resolutions] is to be confined to acts belonging to the same general class as those specifically authorized." *Reed* v. *County Commissioners*, 277 U.S. 376, 389. And even if clause 3 of the resolution might possibly be considered as vague, if viewed alone, the first two clauses leave no real doubt of the area of authority conferred by the resolution on the Subcommittee.

ties. Cf. 360 U.S. at 118–119. The Senate has continued the life of the Subcommittee at the start of each new Congress (*e.g.*, S. Res. 7, 82d Cong., 1st Sess.), has never narrowed its powers, and has continually supported it with substantial appropriations. Cf. 360 U.S. at 119–120. Indeed, in 1956 (shortly after the hearing involved here), the Senate extended the life of the Subcommittee with the same jurisdiction and appropriated a large sum (S. Res. 174, 84th Cong., 2d Sess.) on the basis of the Subcommittee's 1955 Report. See S. Rept. 1385, 84th Cong., 2d Sess. That report described Winston Burdett's testimony concerning Communist infiltration of the press and stated that subsequent hearings confirmed his testimony and provided new information on such infiltration into various New York newspapers. *Id.*, p. 4. The report then said that "[t]he subcommittee's investigation, which was set in motion by Mr. Burdett's revelations, had not been completed at the end of 1955" (*ibid.*).

Petitioner argues, however, that it was never made clear that the topic of Communist infiltration into the press was the topic under inquiry.[5] In fact, however, at the outset of these hearings on January 4,

[5] Petitioner suggests (Pet. 15) that evidence that the topic under inquiry was Communism in general is inconsistent with evidence that the topic was Communist infiltration of the press. This contention has no merit. The usual practice of the Subcommittee in its continuing investigation of Communist activities throughout the United States was to use separate hearings to concentrate on various aspects of the larger topic. Thus, the subject under inquiry at this hearing was *both* Communist infiltration of the press and Communist activity in general, but the former was the more precise and specific subject.

1956, the Chairman stated that the hearing resulted from the earlier testimony of Winston Burdett. Then, both the Chairman and Senator Hennings emphasized that the investigation was into Communist infiltration of the press (see the Statement, *supra*, pp. 3–4). On January 6, the day petitioner testified, after Senator Hennings had made a similar statement (Gov. Ex. 8, p. 1718), the Subcommittee heard a series of seven witnesses all of whom were questioned about this subject. And petitioner himself showed full awareness that Communist infiltration of the press was the subject of the hearing (see *infra*, pp. 17–19).*

2. Petitioner claims (Pet. 11–14) that his rights under the First Amendment have been violated by being compelled to disclose the names of associates in various newspaper and comparable organizations.

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*Petitioner also contends (Pet. 16) that the government failed to establish that the Subcommittee had authorized this particular hearing. It is true that the government did not introduce proof as to this precise issue since petitioner did not contest or raise this point in the district court (or the court of appeals). See *Giordenello* v. *United States*, 357 U.S. 480, 487–488. In any event, the authorization is clear. Under Rule 1 of the Subcommittee's rules, a major investigation must be voted by a majority of the Subcommittee's members. Since seven of the nine members were present at the start of this hearing into infiltration of the press (Gov. Ex. 8, p. 1587) and none objected to it, they undoubtedly considered the investigation as approved. Senator Hennings' statement, on which petitioner relies (Pet. 16–17), concerns (when read in context, Gov. Ex. 8, p. 1588) whether the investigation was an attack on one or more newspapers or was an investigation of Communist infiltration in the press. Senator Hennings claimed that the latter was the correct purpose of the investigation, and the Chairman agreed.

However, in *Barenblatt* v. *United States, supra,* 360 U.S. 109, the Court upheld a congressional investigation of Communist activity in the field of education, an area which, like the press, is generally protected by the First Amendment. Since, as in *Barenblatt,* the Subcommittee had considerable evidence of Communist activity in the area under investigation—and since Communist activity in the press is a matter of grave and proper public concern—"the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended." 360 U.S. at 134.[7]

This case is more precisely like *Barenblatt* than petitioner admits. He argues that *Barenblatt* concerned only questions as to the witness' own participation in Communist activities and not the identity of other individuals engaged in such activities. But in that case this Court expressly upheld the constitutional propriety of the question: "Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?" 360 U.S. at 114, 126 (note 25). This question is substantially the same as the one which is the subject of Count 5 of the indictment involved here: "During all or part of that period, sir, were you a member of the Communist unit or

[7] Petitioner assumes as to the First Amendment issue, throughout his petition, that his past political activities were lawful. Whether or not that is true, "[t]he strict requirements of a prosecution under the Smith Act * * * are not the measure of the permissible scope of a congressional investigation into 'overthrow,' for of necessity the investigatory process must proceed step by step." *Barenblatt,* 360 U.S. at 130.

cell composed of employees of the New York Herald Tribune?" (J. A. 4).[5] And since petitioner was given a general sentence on all counts, his conviction must be sustained if any one count of the indictment is valid. *Barenblatt*, 360 U.S. at 126 (note 25), and 115.

Moreover, while this Court in *Barenblatt* did not find it necessary to consider the questions involved there relating to the disclosure of the witness' associates in Communist activities (360 U.S. at 114–115), we submit that the scope of the decision covers such questions, particularly when the congressional committee has laid the basis for such an inquiry by showing the witness' participation in Communist activities and his knowledge of the organization or persons involved. The "ultimate issue" involved in *Barenblatt* was "whether petitioner could properly be convicted of contempt for refusing to answer questions relating to his participation in or knowledge of alleged Communist Party activities at educational institutions in this country * * *." 360 U.S. at 115. Certainly, questions of an admitted Party member concerning

[5] At least five other questions clearly fitted within the scope of the *Barenblatt* decision because, on their face, they related to petitioner's own "participation in or knowledge of alleged Communist Party activities." 360 U.S. 115. The questions as to whether the New York newspaper with a Communist cell (to which the petitioner had admitted he belonged) was a major paper (Count 3), the name of that newspaper (Count 4), whether petitioner told anyone whether he was quitting the Communist Party (Count 8), whether a book he wrote was published by a Communist publishing house (Count 10), and whether the person for whom he did research was known by him to be a Communist (Count 11) (J.A. 4–5), asked for answers concerning his own participation and knowledge, and did not require disclosure of the names of any associates.

associates in Communist organizations were within his "knowledge of alleged Communist Party activities." Thus, the questions as to the members of the Party cell in New York (Count 1), the members of the Buffalo cell (Count 4), the members of a cell at the New York Herald Tribune (Count 6),* and whether any members of the latter cell are still employed by the Tribune (Count 7), were constitutionally valid. Similarly, the Subcommittee could validly ask petitioner, an admitted Party member, about whether fellow members of various organizations to which petitioner admittedly belonged were *known by him* to be Communists (J.A. 5–6), in view of the Subcommittee's information that these organizations were Communist infiltrated. As the court below stated in *Barsky* v. *United States*, 167 F. 2d 241, 246 (C.A. D.C.), certiorari denied, 334 U.S. 843: "If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the Party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject."

Indeed, the decision in *Barenblatt* goes beyond what is needed to sustain the questions concerning petitioner's associates. Petitioner saw fit to testify as to his own activities and seeks to invoke the First Amendment only in favor of testimony as to third parties. Under this Court's ruling in *Barenblatt*, it is clear that he could not in these circumstances prop-

* Perhaps this question, in view of petitioner's testimony, duplicates the question involved in Count 1.

erly invoke the First Amendment as to his own past and present membership in the Party. *A fortiori*, he cannot invoke the privilege either for the benefit of others or to support his claim against compulsory disclosure of the names of others."

3. Petitioner likewise claims (Pet. 21–22) that the questions related to events too remote in time to be pertinent.[11] But in order to determine, and particularly to understand, the present and future activities of the Communist Party, the Subcommittee must of necessity inquire some distance into the past. The questions petitioner refused to answer concerned Communist activities from 1935 up to the time of the inquiry in 1956. At the very least, the questions in Counts 3 through 6, which related to petitioner's membership and associates in a Party cell in the New York Herald Tribune between 1943 and 1951, and that in Count 7 as to whether any members of that cell were still employed by the Tribune in 1956, were

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[10] Petitioner's reliance (Pet. 12) on *NAACP* v. *Alabama*, 357 U.S. 449, is inapposite. There, the state was attempting to compel disclosure of the membership of an association engaged in lawful activities for lawful ends—and no adequate reason for disclosure was presented. The Court distinguished *Bryant* v. *Zimmerman*, 278 U.S. 63, on the ground that the organization involved in that case, the Ku Klux Klan, engaged in unlawful activity. 357 U.S. at 465. Similarly, this Court "has recognized the close nexus between the Communist Party and violent overthrow of government." *Barenblatt*, 360 U.S. at 128.

[11] The suggestion (Pet. 21–22) that the court of appeals applied an erroneous standard of pertinency is insubstantial. The court's use of the phrases "not without relevance" and "not so distant to be irrelevant" (Pet. App. A, p. 3a) mean nothing different than that the questions were relevant.

plainly not remote.[12] In *Barenblatt*, this Court held (360 U.S. at 125) that the "pertinency" of "questions as to [the witness'] own Communist Party affiliations," including membership in a Communist Club between 1947 and 1950 (*id.*, p. 114), "was clear beyond doubt."

4. Petitioner also contends (Pet. 18-20) that the Subcommittee failed to apprise him of the source of its authority or the pertinency of the questions. Neither point has merit.

(*a*) As for the claim that he was not apprised of the authority of the Subcommittee, petitioner, while claiming that Senate Resolution 366 did not in fact authorize the inquiry, did not raise below the distinct issue whether the Subcommittee told him that its authority was based on this resolution. Moreover, *Watkins* and *Barenblatt* require only that congressional committees apprise witnesses, upon proper objection, of the subject under inquiry and the pertinency of the questions. There appears no need to require committees to give a witness information as to their authority since the authorizing resolution is a public document which is readily available.

(*b*) The transcript of the hearings makes clear that petitioner was apprised—and was aware—of the subject under inquiry. At the start of the hearing, a few minutes before petitioner testified (he was the

[12] As stated above, petitioner's conviction must be sustained as long as any one of the counts is upheld.

second witness on January 6), Senator Hennings stated (Gov. Ex. 8, p. 1718):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication. * * *

Thereafter, in his own statement read to the Subcommittee, petitioner claimed that the Subcommittee lacked authority "to inquire into the beliefs, associations, and activities of individuals connected with the press * * *" (*id.*, p. 1733). In discussing this contention with petitioner, a member of the Subcommittee stated: "A moment ago you stated that you didn't believe this committee had authority to inquire into your beliefs and into your conduct because it was investigating the press" (*id.*, p. 1736). A large number of the questions asked petitioner referred directly and on their face to Communist activities in the press (Gov. Ex. 8, pp. 1728–1732, 1739–1741, 1744–1745, 1754–1755).

Having been apprised of the subject under inquiry—and having himself shown his awareness of this subject—petitioner knew of the pertinency of the questions asked. At the very least, the pertinency of the questions concerning a Party cell in the New York Herald Tribune (Counts 3–7) [13] (J.A. 4–5) was patent. Cf. *Barenblatt* v. *United States, supra,* 360 U.S. at 125.

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[13] Contrary to petitioner's suggestion (Pet. 19–21), the court of appeals found that the questions in Counts 1 through 8—not merely in Count 8 alone—were "clearly pertinent" (Pet. App. A, p. 3a).

5. Finally, petitioner argues (Pet. 17–18) that the indictment was defective because of its failure to specify "the authority of the subcommittee (or the source of such authority),[14] what the question under inquiry was, and how the questions which were the subject of the indictment were pertinent to that question." Since the indictment here (J.A. 4–6) like that in *Russell* v. *United States*, No. 239, this Term, pending on petition for a writ of certiorari, simply charged the offense in the statutory terms, we respectfully refer the Court to our brief in opposition in that case (pp. 8–10). And since during petitioner's own testimony both he and the subcommittee made clear that they understood that Communist infiltration of the press was the subject under inquiry (see *supra*, pp. 17–18), he could not have been prejudiced by the lack of greater specificity.[15]

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[14] Petitioner is incorrect in his contention that the authority of the Subcommittee was not specified. The indictment states that the hearings were conducted "pursuant to * * * Senate Resolutions 366 of the 81st Congress and [its successor] 58 of the 84th Congress * * *" (J.A. 4).

[15] We submit that it is not necessary for the Court to withhold action on this petition until decision of the three contempt-of-Congress cases now pending on the merits: *McPhaul* v. *United States*, No. 33, this Term, certiorari granted, 362 U.S. 917; *Wilkinson* v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 926; *Braden* v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960. One of the issues raised by petitioner—whether the indictment must specify the subject under inquiry—is also involved in *Braden*. But while we cannot, of course, know the reasons why the Court granted certiorari in that case, we believe that this issue is without substance, being controlled by clear, judicial precedent, and is distinctly subsidiary to the more serious issues involved in *Braden*. While this case, like the three pending cases, involves contentions as

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorney.

SEPTEMBER 1960.

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to the pertinency of the questions and the witness' rights under the First Amendment, determination of these issues, in view of this Court's holding in *Barenblatt* (see 360 U.S. at 123–124, 133–134), depends on the facts of each case.

U.S. GOVERNMENT PRINTING OFFICE: 1960

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SUPREME COURT, U.S.
FILED
OCT 2 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 10

ALDEN WHITMAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The New York Civil Liberties Union, the New York affiliate of the American Civil Liberties Union, submits this brief with the consent of both parties, on file with the clerk of this Court.

The case at bar arises from petitioner's refusal in a hearing of a Congressional investigating committee, where he testified fully respecting his membership in the Communist Party some years before, to expose the identity of others he had known in the Communist Party and in other groups and organizations now in public disrepute. His refusal to answer the Committee's demand that he name his past associates was grounded in the belief that he and his acquaintances had engaged only in lawful expression on political, social and economic issues of the day, and that he knew no one who had been connected with subversive

activities or advocacy of revolution or violence. With no justification in terms of the national safety adduced for exposing his past associates to public embarrassment and hostility, petitioner was constrained by deep ethical beliefs from naming them only to exculpate himself before the committee—only to "save his own skin."

Recognizing that the vitality of a democracy rests on the individual citizen's sense of conscience and ethical responsibility, *amicus* is here concerned with the committee's order to petitioner to contravene his conscientious scruples. *Amicus* believes that this order, under the circumstances of this case, was an unjustified interference with the freedom of belief guaranteed by the First Amendment of the Constitution.

Basis of Petitioner's Conviction and Questions To Be Argued by *Amicus*

Petitioner was convicted on 19 counts of contempt, under 2 U. S. C. 192, for refusing to answer questions propounded in a hearing held on January 6, 1956 before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws, of the Senate Judiciary Committee.

Petitioner's position at the hearing was that he had not been apprised of the committee's purpose in subpoenaing him, and that he doubted the pertinence and constitutionality of the entire interrogation. Nevertheless, he stated he would answer all questions except those which were directed to exposing the identity of individuals with whom he had formerly associated. He was unwilling to subject them and their families to the injuries that result from such public denunciation and embarrassment.[1] Despite the in-

[1] Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, of the Committee on the Judiciary of the United States Senate, 84th Cong., 2nd Sess., Part 17, hereinafter termed Hearings, pp. 1733-4, 1737-8, 1740-2, and ff.

timation in the Government's memorandum in opposition to certiorari that the unanswered questions were not all demands for the names of other individuals, it is clear that petitioner's refusals to answer were based on the fact that he so understood them; and the committee, knowing his position as to the type of interrogation he was willing and unwilling to answer, did not apprise him that these questions had any purpose other than to focus on and expose individual men and women. In fact, the committee itself viewed the questions in the same light as did petitioner and regarded his contempt as a refusal to give names. For, the committee stated in its report that petitioner "challenged the jurisdiction of the subcommittee to require him to give the names of any persons who were members with him in the various units to which he belonged."[1] Accordingly, the committee's directions to petitioner to answer must be evaluated as efforts to publicly elicit names and personal identifications through compelled testimony.

Amicus will limit itself to three points in its argument against the validity of petitioner's conviction:

1. Petitioner's conviction violated the due process requirement that unless pertinency appears with indisputable clarity, the witness, upon his objection on grounds of pertinency, must be apprised of the pertinency of the question he is refusing to answer.

2. Petitioner's conviction was invalid under the contempt statute because the Government cannot establish the pertinence of the questions he refused to answer.

3. Petitioner's conviction violated the guarantees of the First Amendment to the Constitution of freedom of belief,

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[1] Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, to the Committee on the Judiciary, United States Senate, 84th Cong., 2nd Sess., for the Year 1956, Section VIII, p. 100. As to the committee's duty of explanation if the questions had any purport other than that assumed by petitioner, compare *Quinn* v. *United States*, 349 U. S. 155, 163-4.

expression, press, and association; and also violated the guarantee of the Fifth Amendment against arbitrary governmental action and unreasonable interferences with privacy.

Summary of Argument

I. Although the pertinence of the questions petitioner refused to answer was unclear, and although petitioner objected to them on this ground, the committee failed to clarify their pertinence. The first requisite for clarification of pertinence is clarification of the subject of the investigation. The subject of this investigation was neither indicated by statements of the committee or its counsel, by the questioning itself, nor by any other source of information. When petitioner suggested the possibility that the subject related to the press, the committee chairman and counsel indicated that this supposition was erroneous.

The range of questions asked petitioner as well as statements in the course of the interrogation, indicated that the committee's interest lay merely in a personal biographical investigation of petitioner due to his past Communist Party membership. This emphasis augmented the obscurity of the pertinence of the questions petitioner refused to answer, which were directed at eliciting the identity of other individuals formerly in the Communist Party and in various defunct groups or organizations.

II. Even if there had, contrary to fact, been a subject of investigation, the pertinence of the questions petitioner refused to answer, requiring him to expose individuals he had formerly known as Communists or members of other organizations, could not be established. The materiality in a grand jury investigation of questions forcing the witness to identify others, does not establish the pertinence of such questions in a Congressional investigation, because of the difference in function of the two bodies. In contrast with the grand jury's function of investigating and charg-

ing individuals, a congressional committee's justification for interrogating witnesses is to secure substantive information on specific subjects for legislative purposes. Names of private individuals do not, of themselves, contribute substantive information to aid in any legislative deliberation. The possibility that these names and identifications, if traced by the committee's staff, might produce witnesses who might have information to contribute in some yet undesignated investigation, is insufficient to render the questions pertinent. This conjectural future utility is far removed from the purpose, required for a conviction under the contempt statute, of gaining information from the witness on the stand pertaining to the subject of the then-current investigation.

When a witness is forced to name others in this type of investigation by a Congressional committee, the named individuals are pilloried without a hearing. On the basis of the witness' impressions and perhaps faulty memory of their past associations with unpopular groups, the names of absent men and women are publicized and held up to public obloquy, without their even having the degree of opportunity for explanation afforded to a witness on the stand.

III. In refusing to name his past associates, under the circumstances in which the committee made this demand, petitioner adhered to a conviction that reflected generally accepted ethical or religious tenets and the credo of a democrat. He was expressing the ethic that a man should not sacrifice other men for his selfish interest: that he should not level accusations against others merely to exculpate himself and unless the public necessity therefor was demonstrated. Petitioner's refusal to answer also reflected a dedication to democratic rights and to the ancient democratic tradition against denunciation of political heretics. For the committee was ordering petitioner to expose individuals to public hostility because, so far as he knew,

they had merely exercised the constitutional right of political dissent.

The demand of conscience upon any ethical individual in this situation to consider whether his accusations would serve the public interest or only self-interest, is intensified by the fact that it is not in keeping with our government's traditions to force private individuals to make public accusations against others. The traditional accusatory role of a private individual—before a grand jury—is far different from the role the committee attempted to impose on petitioner. The order here was for the witness to initiate damaging charges, publicly and with sole responsibility; he was to bear the burden of doing individuals and their families irreparable injury though no defined or established wrongs were under investigation. Indeed, the committee failed to clarify *any* justification from the standpoint of the public welfare for the damaging exposures it demanded of petitioner.

The final element in petitioner's ethical objection was that he could not abandon his sense of personal responsibility for inflicting injury on his fellowmen, with the self-justification that he was under orders of the State. Here again he was expressing a generally accepted democratic ethic. Thus, the Charter of the Nuremburg Tribunal for the trial of war criminals, of which this country was a leading signator, outlawed the defense of "superior order" for the crimes within the tribunal's jurisdiction. That document asserted the principle that an order of the State does not necessarily free a man from his personal responsibility to evaluate and answer for harm he inflicts on his fellowmen.

As against the primacy of freedom of conscience and its severe infringement by the committee, no substantial, and certainly no compelling, justification can be shown for the committee's order to petitioner to abandon and contra-

vene his conscientious beliefs. His punishment by the instant contempt conviction for adhering to his beliefs thus violates the First Amendment. This Court has generally asserted the essentiality of the First Amendment guarantee of freedom of conscience in the context of a minority belief. Certainly the First Amendment protection is even more significant where, as here, the dictate of conscience reflects generally accepted concepts.

The investigation and the questions petitioner refused to answer were also an unjustifiable invasion of the freedom of expression, press, and association protected by the First Amendment.

ARGUMENT

I. Due process was violated because the pertinency of the questions petitioner refused to answer was unclear, nor was it clarified by the committee upon his objection.

Petitioner clearly raised at the committee hearing the issue of the pertinence of the questions he refused to answer. A primary element in his conclusion that giving the names of past associates was unethical, was his lack of comprehension of their pertinence. At the initial demand by the committee for names—the demand that he expose persons he had known as Communists in 1938—he emphasized in his objection that the committee had not stated "the purpose" of interrogating him or "the pertinence" of his affairs "to any valid legislative inquiry" (Hearings, pp. 1733, 1735). And petitioner made it clear that his objection to all the questions he refused to answer was the same (Hearings, pp. 1740, 1741). Thus, whether or not due process requires a disclosure of pertinence absent a pertinency objection, here it was undoubtedly the committee's duty to clarify pertinence unless it was already indisputably apparent. See *Deutch* v. *United States*, 367

U. S. 456, 467-8; *Barenblatt* v. *United States*, 360 U. S. 109, 124-5; *Watkins* v. *United States*, 354 U. S. 178, 214-15. We shall show that pertinence was neither manifest from the circumstances nor clarified by the committee.

There was no clarification of the subject of investigation, which is the first requisite for clarity of pertinence of the questions (*Ibid.*).

The subpoena summoning petitioner to the committee hearing revealed nothing whatsoever about its subject or purpose.[1] When petitioner appeared, two days after the opening of the investigation, there was no introductory explanation or statement by the committee of purpose, and his interrogation began forthwith with questions as to his employment history (Hearings, p. 1728). While petitioner indicated towards the inception of the interrogation his speculation that the subject of investigation might be the press, committee counsel contradicted this possibility and indicated that the committee was concerned only with petitioner's individual employment and status.[2] The only indication by the chairman of the subject of the investigation also negated any possible supposition that the subject was the press: Petitioners' objection to answering

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[1] The subpoena read: "Pursuant to lawful authority, you are hereby commanded to appear before the Internal Security Subcommittee of the Committee on the Judiciary of the Senate of the United States, on Tuesday * * * at their committee room * * * then and there to testify what you may know relative to the subject matters under consideration by said committee. Hereof fail not" etc. The subpoena is printed on page 2 of the Report of the Committee on the Judiciary to the Senate, 84th Cong., 2d Sess., entitled "Proceeding Against Alden Whitman for Contempt of the Senate", and was copied into the record in the District Court. See p. 46 ff. of trial transcript.

[2] Petitioner suggested that a question as to the number of copy desks at the New York Times related to the operations of the press; counsel replied: "No; it is an inquiry directed to determine your standing and influence in the organization, sir." (Hearings, p. 1730.)

was first voiced to a demand for the names of persons he knew in a Communist unit in 1938, which apparently had no connection with the press (Hearings, pp. 1732-3, 1743). The chairman explained that there may be "a Communist unit that is now active in New York City * * * that is one thing that we are investigating," and that the demand for these names was "the very heart of this inquiry" (Hearings, p. 1737). Certainly, no indication that the subject had any relation to the press.[1]

Remarks by a committee member and counsel indicated that the committee's purpose was to ascertain whether petitioner was associated with or "dedicated to the overthrow of this Government" (Hearings, pp. 1736, 1738).

Other than the foregoing statements, all of which were part of the colloquy arising from petitioner's objection to the demand for the names of persons he knew in 1938, no statement indicating the subject of the investigation was made to him. No explanations were made when petitioner repeated his objection in response to subsequent questions.

Nor did the content of the questions asked of petitioner indicate a subject of investigation. Rather, their range corroborated the impression given by the remarks of a commitee member and of counsel (*supra*, and note 2, p. 8), that the committee was interested in eliciting a biographical account of petitioner because of his past Communist Party membership: to examine his employment, the effect thereon of the investigation, his beliefs, and his membership in various other organizations.

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[1] As to the possibility that the subject of the investigation was the alleged current New York unit, any impression to this effect from the chairman's remark was dispelled by the remainder of the colloquy over this question and the coverage of the other questions addressed to petitioner. The government has never contended that the alleged New York unit was the subject of the investigation; if it had been, none of the unanswered questions had sufficient connection therewith to be pertinent.

In the light of petitioner's objections that he did not comprehend the purpose or pertinence of the questions, the committee would have had a duty of explanation even if the subject of the investigation had been recited in the chairman's statement at the opening of the hearing two days before. But in fact the opening statement was more a disclaimer of an intention to investigate the press than the affirmative enunciation of any subject of investigation (Hearings, pp. 1587-8). And the resolution purportedly authorizing the investigation (set forth in Appendix to Petitioner's Brief)—if petitioner should be assumed to have had notice of it—was so all-inclusive and indefinite that it cannot possibly be regarded as specifying the subject for this investigation. In sum, the committee failed to clarify for petitioner the subject of the investigation, and he therefore necessarily lacked a basis for comprehending the pertinence of the questions addressed to him (See cases cited *supra*, p. 8).

Moreover, as to the particular questions petitioner refused to answer, the Committee did not clearly explain the connection of its demands for names to any subject of investigation it might have had in contemplation. In the colloquy over answering the first demand for names, which related to a 1938 Communist group, committee counsel and a committee member emphasized their interest in petitioner's possible advocacy of violence (Hearings, pp. 1736-1738); this interest certainly was antithetical to any comprehension of any purpose in the demand for the identification of others. It is true that the chairman interjected a statement as to the committee's interest in a current Communist cell in New York. But considering that the chairman seemed unsure as to which group was the subject of the pending question, and in any event made no response to petitioner's query respecting the long lapse of time since its existence, and considering that subsequent remarks during this colloquy continued to emphasize the committee's interest in petitioner's personal views, the chairman's remark did not afford either a definitive or clear explanation of the reason

for the question (Hearings, pp. 1737-9). Nor, certainly, did the chairman's subsequent unembellished statement: "We decide to know whom your associates were in the cell of the Communist Party" (Hearings, p. 1738).

The questions petitioner refused to answer appeared to lack relation to a subject of investigation, but instead to be hit-or-miss, aimed at exposing anyone who ever had any connection with the Communist Party or with a Communist Party member.

In sum, despite petitioner's objection on grounds of pertinency, neither the subject of investigation nor the connection of the questions he refused to answer with any subject, were clearly revealed to him. Accordingly, petitioner's conviction violated the guarantee of due process.

II. The Government cannot establish the pertinency of the questions petitioner refused to answer.

As we have already stated and as petitioner's brief argues in detail, neither the authorizing resolution, the opening or subsequent statements of the committee chairman, members, or counsel, nor petitioner's interrogation, establish the subject of the investigation, nor is it established by any other source. Accordingly, the Government cannot carry its burden of proving a subject of investigation, the first requisite for the element of pertinence. See *Deutch*, *Barenblatt*, and *Watkins*, cited *supra*; and *Wilkinson* v. *United States*, 365 U. S. 399, 408.

Even if there had been a subject of investigation, we submit that the pertinence of the committee's demands for names could not be established.

Neither the majority nor dissenting opinions in this Court in previous cases of refusals to answer name-questions (*Watkins*, *Deutch*), have had occasion to consider the pertinency of name-questions as such, nor did the Court below embark on consideration of this point.[1] The Dis-

trict Court did address itself to this issue, stating that the committee was investigating the Communist Party's "history * * * and * * * its numerical strength at various times" and that knowledge of who were Communists in the previous decades was "pertinent to such investigation" (R. 55).[1] While questions as to the number or function of Communists in various groups could, arguendo, be deemed pertinent if the subject had been that stated by the District Court, we submit that even that subject would not render pertinent the name-questions. The damaging publication of the names of particular individuals could hardly be justified for the sake of a census enumeration.

While pertinency in a congressional investigation has been compared to materiality before a grand jury, the validity of name-questions differs in the two types of investigations because of the different functions of the two bodies. The specific function of a grand jury is to trace and identify criminals, and the names of those involved in the activities under investigation are therefore material. Contrariwise, the justification for the interrogation of a witness by a Congressional Committee is its need for substantive information on specific subjects; it is not authorized to accuse or judge private individuals. Its demand for the names of Communists does not elicit information as to status, function, strength, belief, or any other substantive fact about Communism or any subject under investigation. A name is a means of focusing on a particular individual.

It is true, of course, that the names may give the committee leads to summon other witnesses in other investigations; but we submit that this type of utility to the committee does not render the question pertinent. A pertinent question in a Congressional investigation must be directed to eliciting "facts * * * related to the subjects" under in-

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[1] Pages of the printed Joint Appendix filed in the Court below and supplied to this Court, are designated herein as "R."

vestigation. *Sinclair* v. *United States*, 279 U. S. 263, 299. Name-questions, on the other hand, seem the quintessence of a fishing-expedition—they elicit names which, if traced, might produce witnesses who might have information to contribute in some yet undesignated investigation. "The mere hope of stumbling upon valuable information" is insufficient to establish pertinence. (*United States* v. *Orman*, 207 F. 2d 148, 154-5, C. A. 3, 1953.) Concededly these clues for future field-work by the committee staff may be useful. But it "may often be proper, justifiable, and ultimately helpful in the accomplishment of investigative purposes for a Congressional committee to address to witnesses questions which it cannot demonstrate to be pertinent." (*Bowers* v. *United States*, 202 F. 2d 447, 448 (C. A. D. C., 1953).[1]

In *Barenblatt* v. *United States*, this Court seemed to indicate that the legislative purpose served by identifying a witness as a member of the Communist Party was to supply a basis for then interrogating him about "the various manifestations of the Party's tenets" (360 U. S. at p. 130). When instead he is required to name others, there is an exposure of an individual to obloquy, without more.[2] The name stands alone; the finger points to an individual and the eyes of the public, following the pointing finger, fasten on him. Here indeed the individual is pilloried (Compare *Barenblatt*, 360 U. S. at p. 134). His name is broadcast on the basis of a witness' impressions and perhaps faulty memory, without even the degree of opportunity afforded a witness on the stand to explain the allegations against him.

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[1] And consider discussion in *Watkins*, 354 U. S. at pp. 191-3, of British and American legislative investigations without compulsory process.

[2] In none of this Court's considerations of the argument of exposure by the investigating committees, did it consider the special problem of exposure posed by name-questions. See, *e.g.*, *Watkins*, 354 U. S. at pp. 199-200; *Barenblatt*, 360 U. S. at pp. 132-4.

Indeed this procedure seems unfair under the committees' own standards, since one of their purposes in calling a witness into executive session prior to public hearings is to give him an opportunity to refute allegations before they are publicized (see R. 12-13).

In sum, the name-questions were not directed to eliciting substantive information in the investigation in which they were propounded, and were not therefore pertinent.

III. The order to petitioner to name his past associates in the Communist Party and in other groups, despite his conscientious and ethical beliefs, violated the First and Fifth Amendments.

1. Violation of Freedom of Belief and of Due Process.

In refusing to name his past associates, under the circumstances in which the committee made this demand, petitioner adhered to a conviction that reflected generally accepted ethical or religious tenets and the credo of a democrat.

He was expressing the ethic that a man should not sacrifice other men for his selfish interest: that he should not level accusations against others merely to exculpate himself and unless the public necessity therefor was demonstrated (see Hearings, pp. 1737-8; R. 46-54).[1] The committee failed to demonstrate any connection with the public safety of the damaging accusations it called on petitioner to make (see *supra*, p. 10 and *infra*, p. 16). Nor did it offset the fact that it was ordering petitioner to expose individuals to public embarrassment because they had merely, so far as he knew, exercised the constitutional right of political dissent—in effect he was ordered to expose political heretics

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[1] Compare: "Be not a witness against thy neighbor without cause" (The Bible, *Proverbs*, chapter 24, verse 28); and "He who * * * puts his fellow-man to shame in public * * * has no share in the world to come" (*Ethics of the Fathers*, chapter 3, verse 15).

(Hearings, p. 1738; R. 47-8). The committee's demand for names was thus a demand that petitioner foreswear democratic rights and traditions. In petitioner's word, obedience to the committee order would have forced him "to violate the terms of his own being" (R. 54).

We submit that the committee's order to petitioner to abandon and contravene fundamental moral and democratic concepts was unjustified, and that penalizing him for adherence to his beliefs by the instant contempt sentence violated the First Amendment guarantee of freedom of conscience and belief. This Court has generally had occasion to assert the essentiality under the First Amendment of freedom of conscience, whether based on religious or other tenets, in the context of a minority belief. See *Thomas* v. *Collins*, 325 U. S. 516, 530; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 634-5; *United States* v. *Ballard*, 322 U. S. 78, 86; *Torcaso* v. *Watkins*, 367 U. S. 488. Certainly the need to "accommodate the demands of the State to the conscience of the individual"[1] is even greater where, as here, the dictate of conscience reflects generally accepted concepts.

A. It is hardly necessary to spell out the point that the committee's order confronted petitioner with an ethical and moral problem. Petitioner undoubtedly would have inflicted injury on his past associates by naming them before the committee: the wide-reaching damage from public embarrassment, hostility, and obloquy. See *Watkins*, 354 U. S. at p. 197; *NAACP* v. *Alabama*, 357 U. S. 449, 462; *Talley* v. *California*, 362 U. S. 60. It is likewise apparent that even aside from the risk of a contempt conviction, it would have been personally advantageous to petitioner, in the eyes of the community, to have cooperated with the committee and won its approval. Clearly, there is a demand of conscience upon an ethical individual to consider in this situation

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[1] *United States* v. *Schwimmer*, 279 U. S. 644, 654-5 (Holmes, J., dissenting).

whether the public interest or only self-interest will be served by his inflicting harm on his fellows.

The call of conscience is the more poignant because he is confronted by a power that does not seem in keeping with our governmental traditions: the committee's assertion of power to force a private individual to make public accusations against another. To be contrasted with the role that the committee attempted to impose on petitioner, is the role of a witness before a grand jury. Testimony before the grand jury is secret; it is weighed by an orderly procedure before any public accusation is issued; the witness does not bear sole responsibility for the accusation; finally the grand jury is investigating wrongs defined by law, so that there is a clear and established public necessity for information against those involved.

In contrast, the order to petitioner was an order not only to give evidence but personally to inflict injury. He was ordered to initiate damaging charges, publicly and with sole responsibility, and to bear the burden of doing irreparable injury though no defined wrong was under investigation. Indeed, petitioner indicated he knew of no one connected with advocacy of overthrow of the government or any subversion and that for this reason as well as the lapse of time since his Communist membership, he did not understand the national interest in the exposure of his past associates (Hearings, pp. 1733-8, 1743-5). The committee nevertheless failed to clarify any justification from the standpoint of the public welfare for the damaging exposures it demanded (Hearings, pp. 1735-43, and ff.).

B. Not only was petitioner's conscientious objection based on the general ethical precept against sacrificing others to selfish interest, but also on democratic faith. He was asked to denounce individuals with whom he had associated to exercise the Constitutional right to political expression and to strive—so far as he knew—by peaceful means for social betterment (Hearings, p. 1738; R. 47-8).

He was thus called upon to repudiate First Amendment freedoms, and indeed to aid in creating the pervasive fear of nonconformist political expression spread by the committee's exposures of political pasts. Compare *Watkins; NAACP, loc. cit. supra; Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Garner* v. *Los Angeles Board*, 341 U. S. 716, 728 (Frankfurter, J., concurring in part).

Denunciation of political heretics—which in effect was the role the committee sought to force on petitioner—has always been abhorrent to believers in democratic rights. See Chafee, *Thirty-Five Years with Freedom of Speech* (1952), 27-28, citing the early example of a refusal to denounce dissenters by Francis Jenkes. Jenkes had admitted before the Council of King Charles II that he had criticized royal policies but when asked to name who advised him, answered: "'To name any particular person (if there were such) would be a mean and unworthy thing, therefore I desire to be excused all further answer to such questions.' Proceedings against Francis Jenkes, 6 Howell's State Trials 1189, 1194 (1676)."

C. Petitioner had three possible choices: he could consider only his own self-interest; he could adhere to his ethical conviction; or he could desert his sense of personal responsibility for the injury he would inflict on his fellowmen, with the self-justification that he was obeying the orders of the State. When his conscience did not allow him the latter escape, he again expressed the ethical concept of a democrat. Thus the Charter of the Nuremburg Tribunal for the trial of war criminals, with this country a leading signator, outlawed the defense of "superior order" with respect to the crimes within the Tribunal's jurisdiction.[1] Albeit in a situation very different from

[1] See Wechsler, *Principles, Politics, and Fundamental Law* (1961) 141; Glueck, Sheldon, *War Criminals* (1944) c. IX: "Orders of a Military Superior"; Report on International Juridical Status of Individuals as "War Criminals" by Intra-American Juridical Committee (Pan American Union, 1945) pp. 10-11. The defendant's reliance on a superior order was, however, to be considered in mitigation of punishment.

that at bar, but nevertheless with relevance to the instant ethical concerns, the Charter asserted the principle that an order of the State does not free a man from his personal responsibility to evaluate and answer for harm which he, by his personal participation, helps inflict on his fellowmen.

D. In sum, the committee's order to petitioner to name names would have forced him to contravene deeply held conscientious beliefs, reflecting widely accepted tenets—tenets which take cognizance of the need to protect the interests of the State but at the same time assert that an order of the State does not of itself dissolve an individual's responsibility for injuring his fellows. As against the essentiality of freedom of conscience (see cases cited *supra*) and its severe infringement by the committee, we urge that no substantial, and certainly no compelling, justification for the committee's order to give names can be shown. Any possible utility in the questions petitioner refused to answer was diluted by circumstances we have already discussed: that the names would only have yielded clues which, if traced in the field, might produce witnesses who might have relevant information. Further there was no reason to think such information would in any event relate to Congress' central concern (see *Barenblatt*, 360 U. S. at p. 128), advocacy of overthrow of the government.

It is true that under the overwhelming threat to the national safety of war, the conscientious objector is not deemed to have a constitutional right to act on his belief; but the fact that even in such a crisis it is traditional in Anglo-Saxon law to respect conscientious scruples, is significant.[1] Here there was no compelling justification for

[1] See *Girouard* v. *United States*, 328 U. S. 61, 66-7.

the Government's infringement of freedom of conscience, and petitioner's punishment for adhering to his beliefs violates the First Amendment guarantee. Compare cases cited *supra*, page 15.

We further submit that the committee's order to petitioner to expose his past associates violated the due process guarantee in that it was an arbitrary exercise of government power over petitioner and an unreasonable interference with his right to privacy. Compare *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 464-5, 467; *Kent* v. *Dulles*, 357 U. S. 116, 125-6.

2. Unreasonable Interference with Freedom of Expression, Press and Association.

The hearings show, and the Government argues, that the committee was searching out and subpoenaing individuals suspected of a Communist past if they were engaged in the opinion media, and in particular the press. The threat of a public charge of Communist association and of public interrogation by the committee—which can be launched even on an unverified and undisclosed rumor—undoubtedly deterred anyone who was in any way susceptible to such a charge from working in the area of the press and public expression. At the same time, the risk of public embarrassment and obloquy also tended to discourage publication of ideas that might arouse a suspicion of pro-Communism; non-conformist political expression in the opinion media became hazardous when the committee asserted a particular interest and power over persons working in that area.[1]

Thus, without outright prohibition but nevertheless effectively, the committee diminished the guarantee of free expression. Its activity detracted from the Constitutional edict that the government may not restrict expression on

[1] Compare *Rumely* v. *United States*, 197 F. 2d 166, 174 (C. A. D. C., 1952), aff'd 345 U. S. 41; *Talley* v. *California*, 362 U. S. 60.

the basis of a person's associations or relations, past or present, but only if his "utterances transcend the bounds of the freedom of speech which the Constitution protects." *De Jonge* v. *Oregon*, 299 U. S. 353, 365. The government cannot "say * * * some persons may, while others may not, disseminate information. * * * " *Schneider* v. *Irvington*, 308 U. S. 147, 164.

Furthermore, the committee, in the questions petitioner refused to answer, demanded the exposure of individuals who were alleged only to have engaged in peaceful expression of dissident opinion and in association for this purpose. Certainly public obloquy as the result of lawful expression and association discourages free and fearless political dissent and would tend "to operate as a real deterrent to people contemplating even innocent associations." See *Garner, loc. cit., supra* page 17.

This discouragement to free association increases when the committee, as in the case at bar, forces the witness to expose not only his own past unpopular associations, but those of others. There is a fresh violation of the privacy of association by exposure of the affiliations of individuals that the committee has not previously publicized.[1] And by forcing a witness to turn on his past acquaintances in an erstwhile lawful organization, all association is discouraged, because " ' each man begins to eye his neighbor as a possible enemy' " (see *Weiman* v. *Updegraff*, 344 U. S. 183, 191, quoting Judge Learned Hand). Through an association that now appears innocent, he may be forced in the future into the position either of the accused or the accuser, both unhappy roles.

To balance against these interferences with freedom of expression, press, and association. the connection with the national security of the entire investigation—let alone the name questions petitioner refused to answer—was shadowy and obscure. In this case it was not true, as this

[1] Compare *Uphaus* v. *Wyman*, 360 U. S. 72, 81.

Court stated in *Barenblatt*, that "the record discloses considerable testimony concerning the foreign domination and revolutionary purposes and efforts of the Communist Party" (360 U. S. at pp. 131-2). Committee counsel indicated there was no information as to espionage or sabotage connections of the witnesses at these hearings which would even lead to questions on these matters (R. 32). Petitioner's own activity and knowledge was limited to peaceful political association and expression; the committee's interference with First Amendment freedoms through the questions he refused to answer could not find justification in the necessity for information on subversion or violence.[1]

It is true that this Court indicated in the *Barenblatt* opinion that Congress has a legitimate concern with "manifestations" of the Communist Party other than advocacy of overthrow of the Government. But the question at bar is whether the interferences of the committee are constitutional when Congress' basic justification for investigating in this area—protecting the government from violence—is as diluted as it was here. Here the committee was requiring the names of persons who might, if traced, be likely at most to have information about past peaceful manifestations of the Party. We submit that the connection of the questions petitioner refused to answer with Congress' concern with overthrow of the government was too speculative and attenuated to justify the committee's thrust into the area of First Amendment rights. If the questions had any pertinence (*supra*, pp. 11-14), their "slim semblance of pertinency" was insufficient to justify the severe interference they worked in First Amendment freedoms. See *Rumely*, 197 F. 2nd at page 171. Compare *Scull* v. *Virginia*, 359 U. S. 344, 352-3.

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[1] Compare *Deutch*, 367 U. S. at p. 470. where the witness' experience and knowledge did not include the subjects purportedly under investigation.

CONCLUSION

It is respectfully submitted that petitioner's conviction should be reversed.

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September, 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 10

ALDEN WHITMAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the Court of Appeals is reported at 281 F. 2d 59.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 7, 1960. The petition for certiorari was filed on August 5, 1960 and granted on June 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. May a defendant be convicted of violating 2 U.S.C. 192 when the alleged "question under inquiry" was not proved beyond a reasonable doubt and the government's definition of that question in this Court is inconsistent with the prosecutor's oral statement before trial?

2. Are questions relating to lawful political activity from 1935 to 1948 "clearly pertinent" to an investigation of "communist infiltration of the press" conducted in 1956?

3. May a witness be convicted for failure to answer questions about his associates in past lawful political activities, when the Committee fails to reveal to him either the source of its authority or the pertinency of the questions?

4. Did S. Res. 366, 81st Cong., 2d Sess. or S. Res. 58, 84th Cong., 1st Sess. validly authorize the hearing and the questions which petitioner declined to answer?

5. May a witness, who has fully and freely answered all questions put to him concerning his admitted past membership in the Communist Party, refuse, under the First Amendment to the Constitution, to answer questions concerning his associates in lawful political activity in the remote past?

6. Is an indictment for violation of 2 U.S.C. § 192 sufficient under Rule 7(c), Federal Rules of Criminal Procedure, which fails to state the authority of the Subcommittee, what the question under inquiry was, and how the questions asked the witness were pertinent to the question under inquiry?

CONSTITUTIONAL PROVISIONS AND STATUTORY MATERIALS INVOLVED

This case raises questions under the First, Fifth and Sixth Amendments to the United States Constitution and 2 U.S.C. 192, Senate Resolutions 366, 81st Cong., 2d Sess. and 58, 84th Cong., 1st Sess. and Rule 7(c), Federal Rules of Criminal Procedure. These provisions are all reprinted in Appendix "B", *infra*.

STATEMENT OF THE CASE

A. Proceedings Before the Subcommittee

Petitioner, Alden Whitman, since 1951 a copy reader employed by the New York *Times* (J.A.[1] 42), was interrogated by the Internal Security Subcommittee of the Senate Judiciary Committee on January 6, 1956 (J.A. 9, 12), after having been questioned in executive session on December 7, 1955. At the outset of his questioning, he submitted a letter which explicitly challenged the authority of the Subcommittee to conduct the inquiry, the legislative purpose of the interrogation, and the pertinency of his "private affairs, beliefs and associations . . . to any valid legislative inquiry". Gov. Ex. 8, *Hearings*, entitled "Strategy and Tactics of World Communism (Communism in New York)," p. 1733 (hereinafter referred to as *Hearings*). During his interrogation, these objections were orally renewed (*id.*, pp. 1734-38, 1741). Neither in its subpoena nor when Whitman appeared before it did the Subcommittee or its counsel state the basis of the Subcommittee's authority. As we demonstrate later, conflicting and inconsistent statements were made concerning the

[1] J.A. refers to the Joint Appendix in the Court of Appeals, nine copies of which are being filed with this Court.

"question under inquiry".[2] At no time was any effort made to clarify the pertinency of the questions asked to any purported subject matter under inquiry.

The petitioner testified fully concerning his own membership and activities in the Communist Party from 1935 to 1948, and answered the few questions asked relating to this subject. He declined to answer questions which would reveal the identity of other persons whom he had known in the Party, and it is the refusal to answer nineteen such questions which formed the basis for his subsequent citation and indictment for contempt.

The series of open hearings at which appellant testified ran from January 4-6, 1956. Fourteen of the eighteen witnesses called were present or former employees of the New York *Times* (J.A. 24-26). At the beginning, the Chairman stated that the hearings were the result of the testimony of Mr. Winston Burdett, an earlier witness, and that "We are not . . . investigating any newspaper or group of newspapers, we are simply investigating Communism wherever we find it" (*Hearings*, p. 1588).

The bulk of the questions which appellant refused to answer had no relationship to the press or newspapers. They involved employment in 1938 by the National Committee for People's Rights (*Hearings*,

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[2] Four prosecutions for violation of 2 U.S.C. § 192 grew out of the hearings, three of which are now before this Court. Yet the "question under inquiry" was not defined in the indictment and four trials and three appeals have succeeded only in compounding the confusion. In addition to this case, *Shelton* v. *United States* (No. 9, This Term) and *Price* v. *United States* (No. 12, This Term) are now here. A fourth witness, Peck, was acquitted. *United States* v. *Peck*, 154 F. Supp. 603 (DCDC).

pp. 1732, 1743); research on a book (*id.*, pp. 1745-46); the North American Committee to Aid the Spanish Democracy (*id.*, pp. 1746-48); Films for Democracy (*id.*, pp. 1748-49); Veterans of Democracy (*id.*, pp. 1749-50); and from the fall of 1939 to December 1941, the Russian News Agency, TASS, the New York Peace Committee, and the American Committee for the Protection of the Foreign Born (*id.*, pp. 1751-52). He testified that he had been employed by the Buffalo *Evening News* (*id.*, pp. 1728,1753) from December, 1941 to January, 1943; and by the New York *Herald Tribune* from January, 1943, until June, 1951 (*id.*, p. 1753), when he began his present employment. He testified that he left the Communist Party in 1948, though he had been rather inactive for some time prior thereto (*id.*, pp. 1730-31 1745). In each case, the questions asked petitioner which he declined to answer sought to elicit names, or information from which they could be identified, of persons who had been associated with him in the Communist Party, from 1938 to 1948.

The interrogation taken as a whole makes it clear that the Subcommittee was not interested in Whitman's activities as a Communist either before or after his newspaper career. Several questions dealt with his employment at the New York *Times* (particularly the consequences of his receiving the subpoena to testify). (*Hearings*, pp. 1729-31, 1754-55). Whitman was not asked whether, as a newspaper man, he performed services for the Party. Nor was he asked about espionage, although Sourwine subsequently identified TASS, where petitioner had been an office-boy, as "the major c ver for Soviet e pionage in many countries". (J.A. 12). Indeed, almost no questions related to Whit-

man's own party activities. The Subcommittee did not challenge his statement that these had been entirely innocent and that he himself had not taken part in any conspiracy against the Government of the United States. Nor did it doubt that he had severed all relations with the Party. It sought only to identify Whitman's associates.

B. Proceedings Before the District Court

Petitioner was indicted in the District Court for the District of Columbia, charged with nineteen refusals to answer under 2 U.S.C. § 192. The indictment stated that the hearings were held (J.A. 4-6) pursuant to "the Legislative Reorganization Act of 1946, Section 102(1)(k), 60 Stat. 818, and to Senate Resolutions 366 of the 81st Congress and 58 of the 84th Congress, and to the Standing Rules of the Senate". It failed to state what the question under inquiry was, and merely alleged that the defendant "was asked questions which were pertinent to the question then under inquiry" (*id.*). A motion to dismiss the indictment challenging its failure to set forth the authority of the Subcommittee, that the inquiry was within the Subcommittee's authority or to identify the question under inquiry, was denied (J.A. 7).[2]

On April 8, 1957, petitioner was tried before Curran, J. without a jury. In his opening statement, the prosecuting attorney stated that the question under inquiry was "investigation of the Communist activities in the New York area, in particular, in the field of

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[2] The motion also claimed that the indictment was void and illegal because the jury was biased because a majority of its members were government employees subject to loyalty security programs. This point is briefed by petitioner in No. 8, *Russell* v. *United States*, to which we respectfully refer the Court.

strategy and tactics of world communism . . . a very broad investigation, generally speaking, of the internal security and the national security of the United States" (Tr. p. 6, on file with this Court). The only Government witness, the Counsel for the Subcommittee, Mr. Sourwine, attempted to establish the authority of the Subcommittee by reference to a minute of the Judiciary Committee (Gov. Ex. 3) continuing the Internal Security Subcommittee (J.A. 15); on cross-examination he conceded that this minute was not available to the public and had not been made known to petitioner (J.A. 20-22). He further relied on the Committee calendar, but conceded that this does not constitute any official action of the Committee (J.A. 17-19) and a letter from him to members of the full Committee, stating who the members of the Subcommittee were to be (*id.*).

Sourwine testified that "we weren't investigating the newspapers" (J.A. 23); the "purpose of these inquiries was to further the Committee's design to learn all it could about the operations of the Communist Party in as many fields as it could go into . . . the Committee's authority is quite broad . . ." (J.A. 21). He conceded that it was not "sheer accident" that fourteen of the eighteen witnesses were, or had been, employed by the New York *Times* (J.A. 26). A motion for a judgment of acquittal at the close of the Government's case was denied (J.A. 26).

Petitioner testified in his own behalf. He testified fully about his background in the Communist Party and other organizations. (J.A. 38-43). He explained his reasons for joining the Communist Party:

> "Many people at the time were also troubled by the fact that there seemed to be a very heavy con-

centration of economic power in a rather few corporate and individual hands.

"Many people were also widely troubled by the fact that the existing major political parties seemed either unwilling or tardy, dragging their feet, in doing something to solve what on every hand was considered to be a major economic and social disaster for this country.

"As a person who was in college at the time and talked about it and met with others who were equally concerned, I couldn't help but feel that the solution—that there ought to be, under the circumstances, a wide and far-reaching solution to what were obviously economic and social and political imbalances in the country in order to preserve what I felt were the vital democratic traditions of this country.

"I felt at that time that from my readings in history, that third parties in the past had had an extremely energizing effect on the major parties in terms of bringing before the public and later by reason of that fact incorporation in major party programs of economic and social issues that otherwise might have la[in] neglected or might not have had the same impetus." (J.A. 43-44).

After objection had been sustained (J.A. 44-46), defendant offered to prove that "at no time did he become a member of the party with the objective of engaging in the forcible overthrow of the government by force or violence or that it was at any time represented to him that this was one of the purposes of the party." (J.A. 46). He further offered to prove as follows: His own activities in the party consisted principally of attendance at public meetings (at which political problems were discussed, but not espionage, sabotage, etc.) and occasionally selling subscriptions

to the *Daily Worker*. His membership in the party was not clandestine. Beginning in 1942 he worked during the evening hours and so became less active. His associates in the party, like himself, were not secret members, but were engaged in purely lawful political activities. In 1939 the Communist Party had adopted a constitution which provided in part that the party did not advocate overthrow of the government by force; it was regarded as a lawful political party by the general public, and there had been no judicial finding or legislation which characterized the party as an unlawful conspiracy. (J.A. 47-48)

He also testified and offered to testify further about his leaving the party: After the war, it became clear to Whitman that the party would not become the basis of a broad labor party; it also became much more doctrinaire and there was less opportunity for free discussion. The immediate incident that led to his leaving the party was that he had been asked to serve on the grievance committee of the Newspaper Guild at the Herald-Tribune, which was incompatible politically with the party, because the Communist group in the Guild had refused to cooperate with the union's administration, a policy which Whitman "simply couldn't tolerate." (J.A. 50-51).

Finally, Whitman stated the reason for his refusal to disclose the identity of persons he had known to be members of the Party, elaborating on his letter and testimony before the Subcommittee:

> "* * * I felt that by being compelled to answer the questions which I declined to answer, that I would be cast in the role of an informer. Now, like most Americans I have been brought up to despise and abhor the tattletale, the squealer and

the informer. I felt I would be violating the principles and tenets on which I have been brought up if I were asked to assume that role. * * * I felt, too, that I knew that I had engaged only, during the period of Communist Party membership, only in lawful activity. I knew that my associates had engaged only, during the period of Communist Party membership, only in lawful activity. I knew that my associates had engaged also in this purely lawful activity, and I felt that as a result of what I knew to be the case, that if I were to name names to be an informer, that the result would be terrible trouble on the shoulders, on the heads of people who were as innocent as I of any wrongdoing. I was confirmed in this belief by the fact that I knew of my own knowledge of people who had lost jobs, whose careers had been wrecked, whose families had been upset, whose children had been dislocated, purely because they had been exposed to the committee by somebody for what in its own time had been perfectly legal activity and I felt that it would be a mean and ignoble thing if I would be the vector, the agent to bri g destruction on people * * * I knew that, of course, it would be possible to save my own skin by giving the committee what it was pressing me for, namely, the names of other people, but I felt that I couldn't in all conscience do this, because it seemed to me that one of the great heritages and privileges that I had as a citizen in a democracy was that of personal responsibility for my acts. * * * I felt, sir, that as a matter of inner conscience here, that I could not disclose the names of innocent people in order to be of possible benefit to myself. I realized that as a result I would undoubtedly have to stand trial for contempt. The likelihood arose of going to jail, which I am not anxious to do, but I am even less anxious, sir, to become in my own eyes an ignominious person, and I feel deeply that I would utterly lose my

self-respect were I to violate the terms of my own inner integrity." (J.A. 52-54).

* * * * *

The Court found the defendant guilty on all counts (J.A. 55). The Court orally stated that "Inquiry as to the number of persons who were Communists and who they were, between 1935 and 1948, were pertinent to such investigation", and described the inquiry as one "into the extent of the activities of the Communist Party" (J.A. 55).[4] A motion for a new trial was denied (J.A. 59), and the defendant was sentenced to a fine of five hundred dollars and a six months suspended prison sentence (J.A. 62-63).

C. Proceedings in the Court of Appeals

Upon appeal, the Court of Appeals for the District of Columbia affirmed the conviction. 281 F. 2d 59. The Court principally rested on its opinions in *Shelton* v. *U. S.*, 280 F. 2d 701, *cert. granted*, 365 U.S. 857 and *Price* v. *U. S.*, 280 F. 2d 715, *cert. granted*, 366 U.S. 959, holding that the topic under inquiry was not too broad and indefinite, and relied on its opinion in *Deutch* v. *U. S.*, 280 F. 2d 691, *reversed*, 367 U.S. 456, to reject appellant's contention that questions about his

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[4] "The Congress of the United States has the power to investigate the history of the Communist Party, and in this connection, it has the power to determine who are members of the Communist Party. The committee has the power to investigate the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party and the legislative means that might be appropriate for dealing with such activities."

"Inquiry as to the number of persons who were Communists and who they were, between 1935 and 1948, were pertinent to such investigation." (J.A. 55).

associations were not pertinent and invaded his rights under the First Amendment.

In dealing with appellant's argument that the questions were too remote in time to be pertinent the Court found at least Questions 1 through 8 to be sufficient. Then, focussing particularly on Question 8, the Court said :

> "Moreover, one of the questions--'Did you tell anyone you were quitting the Party'—clearly pertained to the mechanics of Party membership at a time not so distant as to be irrelevant to possible practices. Given the presently considered conspiratorial nature of the Party, a common belief of which Whitman does not claim ignorance, it would seem that the questions in counts one through eight were clearly pertinent to an investigation of subversive activities as manifested by the organization of members of the press into Communist Party cells in the period following Warld War II, and such an inquiry was not without relevance to Party activities in 1956, when the Subcommittee questioned Whitman." 281 F. 2d at 61.

SUMMARY OF ARGUMENT

I

A. "The starting point must be to determine the subject matter of the subcommittee's inquiry" *Wilkinson* v. *United States,* 365 U.S. 399, 407. Unless that subject is established, the Government can not fulfill its obligation under 2 U.S.C. § 192 to prove the pertinency of the individual questions. *Deutch* v. *United States,* 367 U.S. 456; *Sinclair* v. *United States,* 279 U.S. 263. Nor can it prove, as it must, the authority of the Committee to conduct the inquiry. *United States* v. *Rumely,* 345 U.S. 41; *Sacher* v. *United States,* 356 U.S. 576.

In this Court the Government nominates "Communist infiltration of the press" as the subject under inquiry. However, Sourwine, the Committee counsel, who made up the list of witnesses and was the chief inquisitor, emphatically denied that this was the subject under inquiry when the first witness during the hearings so contended. Further, when a subsequent witness demanded to know the question under inquiry Sourwine replied "Communist activity." During the course of the hearings at trial and on appeal the Committee, its representatives, the prosecuting attorney and the courts below have given many and mutually inconsistent views of what the question under inquiry was. These are compiled in Appendix A, *infra.* Under these circumstances the Government clearly failed to establish the question under inquiry or the pertinency of the individual questions beyond a reasonable doubt as it was required to do in order to obtain a conviction.

In addition to the failure of proof there is a substantial and prejudicial variance between the prosecution's position at trial and the Government's contention in its opposition to certiorari. In his opening statement the Assistant United States Attorney advised the Court and the defendant that it was the Government's position that the question under inquiry was as broad as the authorizing resolution. The Government may not, therefore, contend here for a lesser topic "Communist infiltration of the press." The prosecutor's opening statement, like a bill of particulars is binding. *United States* v. *Neff,* 212 F. 2d 297 (CA 3); *cf. United States* v. *Fruehauf,* 365 U.S. 146. If the Government may not adopt at this stage a new justification for the admissibility of evidence (*Giordenello* v. *United States,* 357

U.S. 480; *Shepard* v. *United States*, 290 U.S. 96) it plainly may not change its theory as to how it will establish an undisputable element of the defense.

B. Even if it be assumed that "Communist infiltration of the press" was the question under inquiry, the individual questions dealing with petitioner's past lawful political activity were not pertinent to that topic. *Sacher* v. *United States, supra,* requires that questions be "clearly pertinent." The statutory provision for pertinency is the chief protection of the witness' privacy. *Sinclair* v. *United States, supra. United States* v. *Orman,* 207 F. 2d 146 (CA 3). Where, as here, the inquiry touches "an area of speech, press and association" (*Scull* v. *Virginia,* 359 U.S. 344, 352) the courts must "be particularly careful to check unlawful lines of inquiry." *United States* v. *Orman, supra,* at 158.

Questions about lawful political activity are plainly irrelevant to the present efforts to subvert the press. *Wieman* v. *Updegraff,* 344 U.S. 183; *Schware* v. *Bar Examiners,* 353 U.S. 232. Since the questions here covered a period of seven to twenty years prior to the inquiry they were also too temporally remote to be pertinent. Compare *Deutch* v. *United States, supra; Bowers* v. *United States,* 202 F. 2d 447. (CADC)

Questions 3, 4 and 5 were answered. Questions 3 and 10 were so vague that a witness could not constitutionally be compelled to answer them. As to Question 8—"Did you tell anyone that you were leaving the Party"—petitioner invoked the privilege of confidential communication between husband and wife. In these circumstances the claim of privilege clearly indicated that he had told his wife and was so understood by the Committee. Additionally, the claim was well taken.

Question 8 also illustrates the Government's failure to prove pertinency. The District Court and the Court of Appeals had conflicting theories by which they sustained the pertinency of this question. The standard applied by the Court of Appeals, that the question was clearly pertinent to another subject which, in turn, was not irrelevant to the question under inquiry, is inconsistent with the "clearly pertinent" formulation of this Court in *Sacher* and would, if adopted, vitiate the requirement of pertinency.

II

In view of the confusion as to the question under inquiry before the Committee, on trial, and on appeal, it is plain that the question "was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer. Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance." *Watkins* v. *United States*, 354 U.S. 178, 214; *Scull* v. *Virginia*, 359 U.S. 344, 353. The Government's contention that petitioner knew the subject under inquiry is utterly without merit. The explanations given petitioner were conflicting and "Communist infiltration of the press" was not one of them. His own statement to the Committee shows that he thought that "beliefs, associations, and activities of individuals who are or have been connected with newspapers" was the topic. Such an investigation would plainly have violated the First Amendment and the Committee stoutly denied that this was its purpose. Over one-half the questions which petitioner declined to answer had no relation to the press. Compare, *Watkins, supra*, 354 U.S. at 213-14. In short, the Government attributes to petitioner "gifts which mankind does not possess" in asserting

that the subject appeared to him with undisputable clarity at the time of the hearings as *Watkins* requires.

Assuming that it is necessary that a witness make a pertinency objection before the Committee in order to invoke the *Watkins-Scull* principle at trial, petitioner's statement was clearly adequate. *Hearings* p. 1733. His doubts as to why he had been called and the pertinence of the questions were repeated orally. (*Id.* at 1735). This objection was clearer than in *Watkins*, 354 U.S. at 185. No particular form of words is required. Compare, *Quinn* v. *United States*, 349 U.S. 155.

III

A. The Subcommittee was not authorized to conduct this particular inquiry. Neither the Legislative Reorganization Act of 1946 nor the Senate Resolutions which are adumbrated in the indictment gave any power directly to the Subcommittee. When Senate Resolution 58 (84th Cong. 1st Sess.) was under consideration the Senate Rules Committee struck the reference to the Internal Security Subcommittee and substituted therefore "The Judiciary Committee or any subcommittee thereof."

The Judiciary Committee's only resolution regarding this subcommittee did not authorize this inquiry. Sen. Resolutions 366 and 58 are too vague to show whether the Senate authorized it.

The Subcommittee also never met to vote that this investigation be undertaken, although its rules, which were adopted with the knowledge of the Judiciary Committee, so required. The Subcommittee is bound to follow its own rules. Compare *Vitarelli* v. *Seaton*, 359 U.S. 535. Even in the absence of such a rule a sub-

committee does not have power to compel testimony unless delegation from the appropriate House of Congress is clear and unbroken and unless the inquiry is authorized by a vote of the subcommittee's own membership.

B. The holding of *Watkins* v. *United States*, 354 U.S. 178 requires as a corollary that a witness may not be convicted for a violation of 2 U.S.C. § 192 unless he is apprised of the basis of the investigating committee's authority to question him. That authority, like pertinency, is an element of the offense, of which he must be advised in order to determine whether he is within his rights in refusing to answer, as due process requires.

The Committee in its subpoena or at the hearing failed to reveal either 1) the source of its authority or 2) the relationship of the inquiry and the individual questions to that authorization. At no time did any member or representative of the Subcommittee refer to the Senate resolutions relied on by the Government in the indictment or to any other alleged charter of authority.

Since petitioner did not know the question under inquiry he could not determine whether the investigation was within the Committee's authority. Even if he had known that question and had been pointed to Senate Resolutions 366 and 58 these are so vague that he could not have determined whether they encompassed any given topic or individual questions.

In his prepared statement and orally petitioner clearly and insistently questioned the Committee's authority to interrogate him as it did. To convict him without the benefit of an explanation would violate the due process clause of the Fifth Amendment.

IV

Petitioner's conviction also violates the First Amendment. Unlike petitioner in *Barenblatt* v. *United States* 360 U.S. 109, he testified fully and freely about his own activities and balked only at giving information which would expose his associates to injury. This distinction is critical in terms of the associational rights which the First Amendment guarantees. The injury to his associates which he risked imprisonment to avoid, parallels that which was recognized as a defense in *NAACP* v. *Alabama*, 357 U.S. 449 and its progeny. *NAACP* can not be distinguished on the basis that this case involves the Communist Party because the test is whether the conduct was clandestine. *Communist Party* v. *Control Board*, 367 U.S. 1, 101-102. Petitioner and his associates took part in no secret or conspiratorial activities.

Since petitioner could reveal nothing which would help the Committee ferret out present subversive activities its interest in compelling him to be an informer is trivial almost to the point of nonexistence. His conscientious refusal to become an informer, however, is a right deserving the highest degree of constitutional protection.

Here, as in *Board of Education* v. *Barnette*, 319 U.S. 624 the State should not be permitted to extort an act repugnant to the citizen's principles and tenets. There, the conscientious objection of school children to saluting the flag was held to outweigh the interest in national unity during war time. The public interest here is considerably less than in *Barnette*, but petitioner's scruples against informing (J.A. 52-54) rise to at least equal dignity to those which *Barnette* sustained.

To uphold petitioner's conviction would extend *Barenblatt* beyond "balancing" to an absolute holding that any question about Communist Party membership is permissible under the First Amendment. This Court has never so held. We trust that while it sits it will never allow First Amendment rights and the conscience of the citizens to be trampled at the instance of a congressional committee on as insignificant a showing of public interest as was made in this case.

V

Rule 7(c) of the Federal Rules of Criminal Procedure embodies two constitutional principles: 1) the right of a defendant "to be informed of the nature and cause of the accusation" and 2) his right to be tried only upon a finding by a Grand Jury that probable cause exists for his conviction. The indictment in this case failed to satisfy either of the purposes of Rule 7(c).

The indictment did not define the question under inquiry, the pertinency of the individual questions, or the authority of the Subcommittee. *Wilkinson* v. *United States*, 365 U.S. 399, 409 enumerates five issues which can only be analyzed if the subject under inquiry is known. At least two of these are essential elements of the offense which the Government must prove. In *Deutch* v. *United States*, 367 U.S. 456, the Court's identification of the question under inquiry was critical to the result. Plainly, therefore, a witness has a right to know the Government's theory as to the question under inquiry before trial.

An indictment which is silent as to the question under inquiry also denies the defendant a right to be tried only upon a finding by a grand jury that reason-

able cause of a violation exists. The grand jury, like the court and the defendant, can not evaluate pertinency unless the question under inquiry is known. It is readily inferred from the prosecutor's position at trial that the Grand Jury did not indict on the theory that "Communist infiltration of the press" was the subject by which pertinency would be measured. Compare, *Stirone* v. *United States*, 361 U.S. 212.

The confusion in this case concerning the basis of pertinency of Question 8 amply illustrates why the indictment should also state the alleged basis of pertinency of the individual questions.

The indictment must fully state the authority of the Subcommittee. *United States* v. *Lamont*, 236 F. 2d 312 (CA 2). The sources cited in this indictment were insufficient to sustain the inquiry. See Part 3 A, *supra*.

Prosecutions arise on referral from the investigating committee, which must know the question under inquiry, the pertinency of the questions and its own authority. No hardship would be entailed in requiring completeness in indictments. Rather it is a necessity for according defendants in contempt cases the same constitutional rights as other criminal defendants.

ARGUMENT

I. THE CONVICTION MAY NOT STAND BECAUSE THE GOVERNMENT HAS FAILED TO ESTABLISH THE "QUESTION UNDER INQUIRY", OR THE PERTINENCY OF THE INDIVIDUAL QUESTIONS.

A. The Question Under Inquiry

In a prosecution under 2 U.S.C. § 192, the Government has the "duty at the trial to prove that the questions propounded by the congressional committee were in fact 'pertinent to the question under inquiry' by the committee." *Deutch* v. *United States*, 367 U.S.

456, 468 and cases cited. It failed to meet that burden here because it never accomplished the "first step in proving that component of the offense [which] was to show the subject of the subcommittee's inquiry." *Deutch, supra,* at 469.[5] It was 'incumbent upon the United States to plead and show that the question[s] pertained to some matter under investigation". *Sinclair* v. *United States,* 279 U.S. 263, 296-97.[6]

It is true in this case, as it was in *Watkins* v. *U. S.*, 354 U.S. 178, 214, that, "having exhausted the several possible indicia of the 'question under inquiry' we remain unenlightened as to the subject to which the questions asked petitioner were pertinent".

For the first time, in its brief in opposition to certiorari, the Government now states that the question under inquiry was "Communist infiltration of the press" (Opp. cert., pp. 11, 12, 18, 19); see also Opp. cert., *Shelton* v. *U. S.*, No. 9, This Term, pp. 11, 12, 14-15; Opp. cert., *Price* v. *U. S.*, No. 12, This Term, pp. 13, 14. In the course of the hearings, the following colloquy took place between Mr. Sourwine, Counsel for the Committee (who had prepared the list of witnesses, did most of the interrogating, and in the eyes of the Committee members was in full charge of the hearings, J.A. 24, *Hearings,* p. 1718; and see brief for petitioner

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[5] "Evidence is *always a relative term.* It signifies a relation between two facts, the 'factum probandum', or proposition to be established and the 'factum probans', or material evidencing the proposition." Wigmore, *Evidence* § 2 (3d ed., 1940) (emphasis in original).

[6] The inquiry must, of course, be authorized. *United States* v. *Rumely,* 345 U.S. 41, 42-43; *Sacher* v. *United States,* 356 U.S. 576, 577. Thus, the topic under inquiry must be proven also in order to establish the subcommittee's authority.

in *Shelton* v. *U. S.*, No. 9, This Term, pp. 6, 7) and the first witness in this series of hearings, James S. Glaser:

> "Mr. Glaser. . . . The announced reason for this hearing was an intent to investigate Communist infiltration of the press and other forms of communication.
>
> Mr. Sourwine. Who announced that, Mr. Glaser?
>
> Mr. Glaser. Beg pardon?
>
> Mr. Sourwine. Who announced that?
>
> Mr. Glaser. I read it in the New York Times.
>
> Mr. Sourwine. For your information, the Committee has made no such announcement. *It is not accurate*, and you heard the statement of the Chairman this morning, concurred in by all members of the Committee who were present." *Hearings*, p. 1616, emphasis supplied.

In the course of the interrogation of the witness Jerry Zalph, the following exchange occurred:

> "Mr. Zalph. Mr. Chairman, I would like to press my question as to the subject of this inquiry, if I may. I don't feel that was answered . . . .
>
> Mr. Sourwine. The subject matter of this Committee's inquiry is Communist activity and the Committee is proceeding on the basis of previous testimony and information furnished it with respect to Communist activity". *Hearings*, p. 1652,

In Appendix A to this brief we catalogue the conflicting positions taken by the members of the Subcommittee, its counsel, the prosecuting attorney and the courts below on the elusive question under inquiry.

At the outset of the hearing, the Chairman announced that the hearings were "a subsequent chapter to the Burdett testimony", *Hearings*, p.

1587. Burdett, a witness who had appeared during the preceding year, had not referred to appellant; indeed, only one of the witnesses called during the January hearings had been identified by him. Burdett's testimony dealt with his membership in a Communist Party cell at the Long Island Daily Press in 1937 to 1940 and his espionage activities in Europe from 1940 to 1942, when he left the party. (*Hearings*, Part 14 pp. 1359-1363).

Senator Hennings, on the other hand, wished "to make it abundantly clear, if that is the purpose of counsel, and if it is the purpose of the Committee that this is not in any sense an attack on the free press of the United States." (*Hearings*, p. 1588). He added that "of course the Committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency." (*id.* p. 1587). The Chairman and Senator Watkins expressed agreement with Senator Hennings statement. (*Id.*)[7]

At the opening of the hearings on the day Whitman testified, Senator Eastland again made a statement, this time referring to the testimony of Clayton

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[7] In the context of the entire discussion we do not believe that the Chairman's acquiescence in Senator Hennings' remarks indicates a purpose to limit the inquiry to Communist infiltration of the press. Senator Eastland's additional comments suggest rather that his attention was focussed on Senator Hennings' disclaimer—in which he joined—"of any attack upon any one newspaper, upon any group of newspapers as such". (*Hearings*, p. 1587) For the Chairman said "We are simply investigating communism wherever we find it." This interpretation is confirmed by the Chairman's comments to witnesses, (e.g. to Whitman, *Hearings* pp. 1737, 1738), Sourwine's statements (*Id.* pp. 1616 and 1652) and Senator Eastland's own testimony at the *Peck* trial. Transcript in *United States* v. *Peck*, Cr. 1215-56, p. 235 (D.C.D.C.).

Knowles who named neither Whitman, Shelton or Price.[8]

In the course of the questioning of petitioner he was told that the names of his associates in a Communist cell during the 1930's not shown to have had any relationship to the press were "the very heart of this inquiry". *Hearings*, p. 1737.

The indictment charging petitioner did not identify the question under inquiry.

In his opening statement, the prosecuting attorney stated this was "an investigation of the Communist activities in the New York area, in particular, in the field of strategy and tactics of world communism" (Tr. p. 6). The Government's only witness, Committee Counsel Sourwine, testified that "we weren't investigating the newspapers and we weren't going into matters which were unlawful under the laws of the United States" (J.A. 23).

The District Court rested on the ground that the Committee "has the power to investigate the growth or the decline of the Communist Party . . . as part of an inquiry into the extent of the activities of the Communist Party" (J.A. 55), obviously confusing the issue of the powers of the Committee with the problem of the question under inquiry.

The Court below declared that one of the questions was proper as related to "the mechanics of Party membership" (281 F. 2d 59, 61); at no other time has it been suggested that this was the question under inquiry.

The majority of the counts stated in the indictment were founded on refusals to answer questions which have no discernible relation to the press (Counts 2,

[8] Knowles' testimony is reported at *Hearings*, 1635-1645.

9-19), and related to periods when petitioner was in no way connected with any newspaper. As in *Watkins* v. *U. S.*, 354 U.S. 178, 213-214, "When almost a quarter of the persons on the list are not labor people, the inference becomes strong that the subject before the Subcommittee was not Communism in labor". Where over one-half the questions asked appellant have no remotest relation to "Communist infiltration of the press", the inference likewise becomes strong that this was not the question under inquiry.

As the Court again emphasized in *Deutch* v. *United States*, 367 U.S. at 471, 2 U.S.C. § 192 is a criminal statute, "and the courts must accord to defendants every right which is guaranteed to defendants in all other criminal cases." (Quoting *Watkins*, supra at 208) "An essential part of a procedure which can be said fairly to inflict such a punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt." *Christoffel* v. *United States*, 338 U.S. 84, 89. See also *Heikkinen* v. *United States*, 355 U.S. 273, 276. Whatever else may be in doubt on this record, one thing is clear: It simply will not sustain the proposition that the Government has proven that "Communists infiltration of the press" was the subject under inquiry at these hearings. To be sure, there is *some* evidence to that effect. But, as we have seen, the preponderance of the evidence—far more than enough to raise a reasonable doubt—refutes this theory. Most compelling, of course, is Sourwine's categorical disclaimer of that suggestion, and his unqualified assertion that "Communist activity" was the subject under inquiry.[9] (*Hearings*, pp. 1616, 1652)

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[9] It is worth recalling that this is the person who drew up the witness list, asked the majority of the questions, and who, in the eyes of the committee members themselves, was conducting the investigation. (J.A. 24, *Hearings*, p. 1718)

Manifestly, a witness may not be punished under a statute which postulates "pertinency to the question under inquiry" as an element of the offense, under a theory of pertinency unequivocally disavowed by his chief interrogator.

Quite aside from its failure of proof, the Government is foreclosed from now supporting this conviction on the theory of a particular, limited question under inquiry. The prosecutor said nothing about "communist infiltration of the press" in his opening statement; rather he made it clear that the government was proceeding on the theory that the committee was conducting "a very broad investigation, generally speaking of the internal security and the national security of the United States". (Tr. p. 6) It was on this basis that the Government tried its case, and, what is more important, on this basis that the defendant tried his. The Sixth Amendment gives a defendant the right "to be informed of the charges against him", and it is a violation of due process to convict a defendant on a ground not charged. *De Jonge* v. *Oregon*, 299 U.S. 353; *Cole* v. *Arkansas*, 333 U.S. 196. In this case petitioner was not advised of the subject under inquiry by the indictment. We shall urge below that this was fatal error. But if the defendant cannot look to the indictment the Constitution requires that he be informed otherwise, to enable him to defend. The bill of particulars or the opening statement serves this purpose. In *Shelton*, No. 9, the same prosecuting attorney gave an oral bill of particulars explicitly disavowing any question under inquiry narower than the authorizing resolution. The prosecution is bound by the bill of particulars, *United States* v. *Neff*, 212 F. 2d 297, 309 (C.A. 3). The opening statement does not differ in

principle. Cf. *United States* v. *Fruehauf*, 365 U.S. 146, 157-58:

> "Nor does the record raise questions concerning the sufficiency of the indictment . . . For this is not a case in which the District Court has construed the allegations of an indictment, or limited the scope of the Government's presentation by construction of a bill of particulars or the prosecutor's opening statement."

On two occasions this Court prevented the Government from supporting the admission of important evidence here on a theory other than that on which it had relied at the trial. *Shepard* v. *United States*, 290 U.S. 96; *Giordenello* v. *United States*, 357 U.S. 480. As this Court said in *Giordenello*:

> "We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory into this case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time." Id. at 488.

This reasoning is applicable here *a fortiori*, for the government has changed the theory by which petitioner's guilt is to be judged. The question under inquiry is central to the whole case. See the discussion at pp. 20-21, 60-63. Under these circumstances we do not think prejudice need be shown. Compare *Kotteakos* v. *United States*, 328 U.S. 750. In any event, preju-

dice is clear enough here. Had defendant known that the Government was resting its case on the proposition that "Communist infiltration of the press" was the question under inquiry, he could have cross-examined Sourwine on the basis of his contrary statements at the hearing. He could have introduced members of the committee to determine whether they thought that to have been the topic of their investigation. (Compare *United States* v. *Peck*, n. 2, *supra*, where Senator Eastland testified.) Defendant, who it is now claimed, knew this to be the subject (opp. cert., pp. 12, 17, 19) could have attested to his mystification. Above all, the confusion on this issue, which has endured past trial and appeal, would have been dispelled at the outset.

B. The Questions Which Petitioner Declined to Answer Were Not Pertinent to the Subject Under Inquiry

For the purposes of this discussion, we must assume the Government's position that the question under inquiry was "Communist infiltration of the press". The Government now appears to concede that the majority of the counts on which appellant was indicted and convicted were not pertinent to this topic (Counts 9-19). It is our basic position that questions, relating to matters occurring from eight to sixteen years prior to the investigation, dealing with matters which, it is not disputed, were purely lawful political activities, engaged in prior to the establishment of the Subcommittee, the passage of the Internal Security Act of 1950 and the decision of this Court in *American Communications Association* v. *Douds*, 339 U.S. 382, as part of an inquiry focussed on a great American newspaper, were not designed to elicit information pertinent to this subject matter.

In *Sacher* v. *United States*, 356 U.S. 576, 577 this Court laid down the rule, which is no more than another facet of the Government's duty to prove all elements of the offense beyond a reasonable doubt, that the questions must be "clearly pertinent" to the subject under inquiry.

The importance of a strict standard of pertinency is best understood in terms of its purpose to protect individuals against "unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs". *Sinclair* v. *United States*, 279 U.S. 263, 292. Accord: *McGrain* v. *Daugherty*, 273 U.S. 135, 176-77; *Bowers* v. *United States*, 202 F. 2d 447, 448 (CADC). As Chief Judge Biggs wrote for the Court of Appeals for the Third Circuit, *United States* v. *Orman*, 207 F. 2d 148:

> "The individual must rely, for the protection of his privacy upon the requirements of pertinency . . ." *Id.* at 158.

From this principle Judge Biggs derived the following corollary:

> "When an investigation enters a field to which the First Amendment is applicable, courts will be particularly careful to check unlawful lines of inquiry." *Id.*

This formulation, by requiring a high degree of pertinency in "a field to which the First Amendment is applicable," in effect balances the need of Congress to expand the lines of inquiry beyond the immediate subject and the nature of the right of privacy claimed by a witness. Such balancing in the application of a rule of privilege is not novel. *Roviaro* v. *United States*, 353 U.S. 53, 62. To strike such a balance in favor of First

Amendment rights is consistent with prior decisions, e.g. *Smith* v. *California*, 361 U.S. 147 and cases cited id. at 150-51.[10]

Barenblatt v. *United States*, 360 U.S. 109, is not inconsistent with the *Orman* formula or its application in this case. While the *Barenblatt* balancing test has certain surface similarities, it was developed in the unique context of "constitutional adjudication" id. at 125, and of "constitutional legislative power" id. at 133 and see id. at 127. Pertinency, as a statutory condition for a contempt conviction, was separately considered, before the constitutional balance was undertaken. *Id.* at 125. The pertinency of Barenblatt's own membership in the Communist party was deemed "clear beyond doubt." *Id.* at 125. This was followed in *Wilkinson* v. *United States*, 365 U.S. 399, 413. The *Sacher* decision, *supra* which requires questions to be "clearly pertinent" was thus left undisturbed. The *Orman* formula comes well within *Sacher*; its chief utility is in its emphasis on the special need to assure against intrusion into the witness' privacy when his First Amendment rights might be jeopardized. This Court has recently described the intimate connection between the constitutional guarantees of privacy and freedom of expression. *Marcus* v. *Search Warrant*, 367 U.S. 717, 724-29.

We understand *Scull* v. *Virginia*, 359 U.S. 344 to have given implicit approval to the test which *Orman*

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[10] "Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression." Id. at 150-51.

The same principle has been applied in interpreting statutes, and not merely to avoid constitutional doubts. See, e.g. *Eastern R. Conf.* v. *Noerr M. Lines*, 365 U.S. 127, 137.

succinctly formulated. *Scull* followed *Watkins* v. *United States,* 354 U.S. 178, in holding that a witness must be informed of the Committee's power to compel his testimony. 344 U.S. at 345 and 353. However, the Virginia statute under which Scull had been convicted, unlike 2 U.S.C. § 192 imposed no pertinency requirement. Thus this Court must have viewed pertinency as a constitutional predicate of the committee's authority at least in the area of the First Amendment. Pertinency is a condition of the "compelling state interest" which must be "clearly shown" if "areas of individual liberty" such as speech, press and association are to be invaded. id. at 352-53.

While, as stated, we believe the *Orman* rule to have been adopted implicitly in *Scull,* we envision two salutary consequences if it is expressly established as a guide to the lower courts: (1) Congressional committees will be discouraged from rummaging around pointlessly in the private lives of citizens, because the sanctions of the contempt statute will be unavailable; (2) witnesses will be able to judge whether they may lawfully remain silent (and counsel will be able to advise them) according to a meaningful and workable standard. The record in this case, and in other cases which have come before this Court evidence all too plainly that some Congressional committees have failed to keep within any discernible bounds of pertinency or relevancy, despite the fact that their investigations are at the outskirts of, when they do not actually intrude upon, First Amendment freedoms. The second point "attains proportion when viewed from the standpoint of the witness who appears before a congressional committee." Cf. *Watkins supra* at 208. He must judge at his peril (*Sinclair* v. *United States, supra* at

299; *Braden* v. *United States*, 365 U.S. 413, 437-38) between abandoning First Amendment rights (*Scull*, supra at 353) and possible imprisonment. He acts in a charged atmosphere, under enormous emotional tension;[11] the assistance which counsel is allowed to give him is severely curtailed.[12]

While we accept, as we must, the *Barenblatt* test for purposes of constitutional adjudication, it cannot serve as a standard by which the layman, even under the most salutary circumstances can judge his rights. We do not understand that to be its purpose. Plainly, a witness, or his counsel cannot weigh "the competing

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[11] As Senator Hennings noted, a witness "may be seriously damaged in his own personal and professional life." *Hearings*, p. 1719. (See also the eloquent comments of witness *Glaser*, *id.* pp. 1615-16, 1619.) Reporters and photographers and sometimes television cameras and klieg lights crowd the committee room. (The very purpose of an open hearing is publicity.)

[12] Counsel is not permitted to address the Committee to make objections; these must come from the witness himself. Counsel may not volunteer advice, the witness requests permission to confer. (See *e.g. Hearings*, pp. 1730, 1731, 1732, etc.) Counsel is not even immune from attack by the Committee. The record in *Shelton* affords a shocking but apposite example. In the guise of testing the witness' credibility at the closed hearing, committee counsel inquired whether he knew his attorney, Osmond K. Fraenkel, a distinguished member of the Bar, to be a Communist. (R. No. 9, p. 59). That incident is particularly instructive here, for Senator Hennings said, on objection to this question:

> "The Chair might observe sir, that it would seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant and what is pertinent to the subject matter of this inquiry."

Whereupon Sourwine continued to press for an answer. (R. No. 9, p. 60.)

private and public interests at stake in the particular circumstances shown." They lack the data to analyze the needs of the committee or national security. See Senator Hennings' statement at n. 12 *supra*. The witness' main protection must come from the pertinency standard which Congress imposed.

That, by contrast, is a standard by which men live and make decisions daily. To lawyers particularly, problems of pertinency are a staple. Wigmore has declared it to be axiomatic "for any system of evidence purporting to be rational" that *"None but facts having rational probative value are admissible."*[13] Any meaningful test of pertinency must impose at least a standard of rationality. The *Orman* and, we believe, *Scull* decisions require a particularly high degree of rational connection between the question and the subject under inquiry where the inquiry touches upon First Amendment rights. A more precise formula cannot be rendered. "The difficulty is that we cannot escape, in relation to the problem, the use of undefined defining terms." * * * "But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standards does not wholly fence it in." *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474.

The investigation into petitioner's associations in past lawful political activity clearly entered an area to which the First Amendment is applicable. *Scull* v. *Virginia*, 359 U.S. 344, 352. Not even *Barenblatt* denied that the First Amendment is germane—it merely held that it was not controlling "upon the particular record before us," 360 U.S. at 125 *et seq.*

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[13] I Wigmore, *Evidence* § 9, p. 289 (3 ed., 1940) (emphasis in original).

Further, this entire inquiry turned predominantly about the New York *Times*. That newspaper was under no illusions concerning the purpose of the inquiry, for reasons which it set forth at length editorially (J.A. 56). It said that

> "It seems to us quite obvious that the Eastland investigation has been aimed with particular emphasis at the *New York Times*."

The curious use made by the Committee of the Matusow affidavit, with reference to alleged employment of Communists by the New York *Times*, is revealing (J.A. 29-31).[14] Extensive citation of authority is scarcely necessary to demonstrate that efforts to coerce the editorial policy of a great newspaper intrude on First Amendment rights. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250.

If the question under inquiry was that now asserted by the Government, "Communist infiltration in the press," the pertinent question to ask would be, "Do you have any present information about communist infiltration of the press?" If the answer were "No," the witness should be dismissed, if "Yes," further inquiry would be proper. Nothing even approaching this question was asked. Having ascertained that the witness had no information more recent than 1948, the Committee nonetheless continued its questioning into past irrelevancies in a transparent effort to compel the witness to choose between a contempt citation and an ig-

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[14] The Committee devoted considerable attention to the effect of its subpoena on the employment of petitioner, and other witnesses from the *Times*. Their private conversations with their employers were subjected to minute scrutiny. They are cited in Brief for Petitioner in *Shelton* v. *United States*, No. 9 at p. 54.

noble role as an informer. It is true that one question, that in Count 7, can be read to inquire whether any persons who had been members of a cell with petitioner prior to 1948 were presently employed at the Herald Tribune. But neither this, nor any other question asked the petitioner, sought to elicit from him any information concerning "Communist infiltration of the press" at the time of the interrogation, or at any time reasonably proximate thereto; he was *not* asked the question "Do you know whether any Communists are now employed at the Herald Tribune?" or any similar question designed to ascertain whether he had knowledge of present, or reasonably proximate, Communist activity with relation to the press. This question therefore suffers precisely the same infirmities—remoteness in time and subject matter—as do the other questions asked petitioner which he refused to answer.

The identity of individuals engaged in lawful associational and political activities (which is all that was involved here, *Hearings,* p. 1738, JA 47-48) is not "clearly pertinent" to an inquiry into current efforts to influence the contents of the press to the ends of the Communist Party. On the contrary, *Wieman* v. *Updegraff,* 344 U.S. 183 and *Schware* v. *Bar Examiners,* 353 U.S. 232 hold that the fact that an individual has taken part in such lawful political activity, though on behalf of the Communist Party, is *no* evidence that he would practice his profession or conduct himself in employment in a manner so as to serve the purposes of the Communist Party, rather than of his employer.

In *Wieman,* this Court struck down a loyalty oath for teachers, because it had been interpreted by the State Supreme Court as barring from employment individuals who had been members of the Communist Party

(or other organizations listed as "subversive") without knowing the character of these organizations. This Court unanimously held that *"Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."* 344 U.S. 183 at 191. (Emphasis supplied.)[15]

Petitioner in *Schware* had joined the Communist Party in circumstances closely paralleling Whitman's and for largely the same reasons. Compare 353 U.S. 232 at 236 and 244-46 with JA 43-46 (Statement, pp. 7-9). The Court held that his membership constitutes "no evidence * * * which rationally justifies a finding that Schware was morally unfit to practice law."[16]

The scope of review, and thus the standard of pertinency, in *Wieman* and *Schware,* was much slighter than in this criminal case. Lawful political activity is of the essence of First Amendment rights. Thus, the

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[15] That case was decided "in the context of" three decisions upholding the power of the state to exclude disloyal persons from public service. *Id.* at 188. One of these, *Adler* v. *Board of Education,* 342 U.S. 485 had held that "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live." *Id.* at 493. Yet, without disturbing the authority of *Adler* the Court in *Wieman* held that it was arbitrary to draw any inference of present disloyalty from past, unknowing membership. The inference is no more plausible where the individual works for a newspaper.

[16] It is true that Schware left the Party in 1940, and time is a significant factor. Yet the difference of eight years alone does not transmute membership which was *"no evidence"* of present character into a fact "clearly pertinent to" a propensity to slant the news. In *Wieman,* moreover, the oath related to membership "within the five (5) years immediately preceding the taking of this oath," 344 U.S. at 186, and yet *scienter* was held to be constitutionally, because rationally, indispensable.

importance of "cutting off unlawful lines of inquiry" is particularly acute.

We urge further that temporal remoteness is at least as important as spatial remotness, which governed decision in *Deutch* v. *United States, supra* at 470.

In *Bowers* v. *United States,* 202 F. 2d 447, 449 the Court said,

> ". . . we are unable to see how an investigation into the activities of organized crime in interstate commerce which was being conducted in 1951 would be furthered in any way by the subcommittee's knowledge of what business Bowers engaged in in Chicago some twenty-four years before."

The Court also held that a question as to how Bowers had earned money which he had invested nine years before the hearing "may have been in fact in some remote way pertinent to that inquiry, but, if so, the government made no effort to establish that fact." *Id.* at 450.

The activities in which appellant engaged covered the years 1935-1948. The inquiry here was conducted in January, 1956. (J.A. 52). While it is true that the temporal remoteness in *Bowers* is somewhat greater than here, we think it clear that the question put to Bowers did not "enter a field to which the First Amendment is applicable," and that a higher standard of pertinency is therefore here appropriate.[17] More-

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[17] "Although the process of decision in this area, as in most requires more than a mere color-matching of cases," (*Cf. Reck* v. *Pate,* 367 U.S. 433, 442) the decision in *Sherman* v. *United States,* 356 U.S. 369 also illustrates the erosion of pertinency by time. There, "a nine-year old sales [of narcotics] conviction and a five-year old possession conviction [were held] insufficient to prove petitioner had a readiness to sell narcotics at the time"—of the alleged offense, *Id.* at 375.

over, the passage of time has been particularly significant in connection with the Communist Party membership because the nature of the Party and the Government's relation thereto has changed drastically over the years. When petitioner joined the Party and was active in it the Party was lawful and was on the ballot in many States including New York. The first decision of this Court in which the Party was deemed to be a conspiracy was decided in 1950. *American Communications Association* v. *Douds*, 339 U.S. 382. The first Act of Congress directed at the Communist Party became law the same year. We submit that membership in a Party when it is lawful is in no way probative of membership when it becomes unlawful or its subversive nature is known.

In rejecting the remoteness argument as to the first eight counts, the Court of Appeals applied a standard which was too loose to be meaningful. It said that the questions comprising these counts were "clearly pertinent to an investigation of subversive activities as manifested by the organization of members of the press into Communist Party cells in the period of World War II, and such an inquiry *was not without relevance* to Party activities in 1956" (Statement, p. 12 above, (emphasis supplied)). But it is not a proper test that a question is clearly pertinent to a subject *which in turn* is "not without relevance" to the question under inquiry (which the Court apparently thought was Party activities in 1956). Obviously, any question is clearly pertinent to *some* topic; but the statute requires pertinency to the question under inquiry. It is not satisfied by pertinency once removed from that question.[18]

[18] The Court's reasoning on the pertinency of Count 8 also followed this erroneous two-step route.

Counts 3, 4 and 5 were answered by petitioner when he affirmed the truth of answers given the Subcommittee in executive session. *Hearings,* pp. 1741-42. Indeed, Count 6, as set forth in the indictment assumes the answers to these questions. (JA 5). Counts 3 (whether a newspaper was one of the "major newspapers" in New York) and 10 (whether a book had been published by a "Communist publishing house") are void for vagueness. The Sixth Amendment requires that a question which is the subject of a contempt or perjury indictment be sufficiently clear in meaning so that one who desires to answer it truthfully is assured that he can do so. *O'Connor* v. *United States,* 240 F. 2d 404 (CADC); *United States* v. *Lattimore,* 215 F. 2d 847 (CADC); cf. *Louisiana* v. *N.A.A.C.P.,* 366 U.S. 293. The standards for determining what is a "major newspaper" or a "Communist publishing house" are entirely subjective.[19]

A reading of the colloquy in connection with the question in Count 8 leaves little doubt that it, too, was answered. *Hearings,* pp. 1745-46. When a witness, in response to the question "Did you tell anyone you were quitting the party?" spontaneously invokes the privilege of a communication between husband and wife, only a mind determined not to be informed will fail to

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[19] What was the "meaning attached to these terms by the interrogator" (*O'Connor, supra* at 405)? Is the test of a "major newspaper" circulation? Advertising lineage? Number of copy-desks? (See *Hearings,* p. 1730). Degree of opposition to the Eastland Committee? (See JA 56). Is a "Communist publishing house" one which employs present members of the Communist Party, or individuals who had been nonconspiratorial members eight years previously? Is it one which publishes only Marxist-Leninist tracts or only books with the *imprimatur* of an official of the Communist Party?

conclude that he told his wife. Counsel for the Committee clearly understood this, for his next query was "*Other than your wife*, did you tell any person that you were quitting the Communist Party?" *Id.* (emphasis supplied). The claim of privilege was, in any event, well taken. *Wolfle* v. *United States*, 291 U.S. 7; *Blau (Irving)* v. *United States*, 340 U.S. 332.

Count 8 illuminates the whole issue of the proof of pertinency. The District Court had trouble with this question alone (JA 37-38) yet the Court of Appeals relied on it most heavily. See Statement, p. 12, *supra*. The prosecuting attorney, and apparently the District Court at his instance, thought the purpose of the question was to test the credibility of the witness.[20] (JA 37-38). The Court of Appeals thought it "clearly pertained to *the mechanics of party membership* at a time not too distant to be irrelevant to possible present practices" (emphasis supplied). For what it may be worth, we think the question had still a different purpose, to require petitioner to reveal the names of persons whom he had told he left the Party. In other words, it was merely another device by tenacious counsel to extract names from the witness. Whichever view correctly analyzes the thought processes of the inter-

[20] We do not agree that a question is pertinent merely because it tests a witness' credibility. "Pertinency" means "pertinent to a subject matter properly under inquiry, not generally pertinent to the person under interrogation." *Rumely* v. *United States*, 197 F. 2d 166, 177 (CADC) *affirmed*, 345 U.S. 41, quoted with approval in *United States* v. *Orman*, 207 F. 2d 148, 153 (CA 3. Thus, credibility is at least one remove from a proper subject. Further, any question could be justified on that basis, as for example the question whether the witness' counsel is a Communist. (R. No. 9, (*Shelton*), p. 59, n. 12, *supra*). This would entirely destroy the requirement of pertinency. See *Bowers* v. *United States*, 202 F. 2d 447, 452.

rogator, the very abundance of possibilities shows that on this record the basis of pertinency must remain a matter of speculation. Unless the pertinency of a question is clear on its face, it is incumbent upon the Government to present evidence to that effect. *Bowers* v. *United States*, 202 F. 2d 447, 452 (CADC); *United States* v. *Orman*, 207 F. 2d 148, 154-55 (CA 3).

In sum, the position is that petitioner stands convicted of a count (which alone would suffice to sustain the sentence) on one theory of pertinency, his conviction is affirmed on another, and may be defended here on yet a third, since the Courts of Appeals rested on a different question under inquiry than that which the Government has now proffered. None of these theories was set forth in the indictment, mentioned in the opening statement, or supported by anything but the prosecutor's say-so after his case was closed. The defendant's opportunity to defend on the issue was *nil*. Yet in a sense he is better off on this count than on all the rest—as to which the prosecutor might have had one theory, the Trial Court a second, the Court of Appeals a third, and yet all remain hidden.

This case, like *Deutch* can be decided within the "conventional framework of the federal criminal law." 367 U.S. at 472. "Presumption or possibility of pertinency will not suffice." *Bowers, supra* at 448. "One of the rightful boasts of Western civilization is that the [prosecution] has burden of establishing guilt solely of the basis of evidence produced in court . . ." *Deutch* v. *United States*, 367 U.S. at 471 quoting from *Irwin* v. *Dowd*, 366 U.S. 717, 729 (concurring opinion).[21]

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[21] Even in a civil action "speculation cannot supply the place of proof, *Galloway* v. *United States*, 319 U.S. 372, 395"; *Moore* v. *Chesapeake and O. R. Co.*, 340 U.S. 573, 578.

Where the Government has failed to prove the existence of any question under inquiry beyond a reasonable doubt, and the pertinency of the individual questions remains a matter of surmise, the requirements for a conviction under 2 U.S.C. § 192 have not been met.

II. THE CONVICTION MAY NOT STAND BECAUSE PETITIONER WAS NOT ADVISED OF THE SUBJECT UNDER INQUIRY OR THE PERTINENCY OF THE INDIVIDUAL QUESTIONS.

Watkins v. *United States,* 354 U.S. 178 and *Scull* v. *Virginia,* 359 U.S. 344 established as a requirement of due process that a witness be given "a fair opportunity to determine whether he is within his right in refusing to answer" 354 U.S. at 215. Essential to such a determination is that the subject under inquiry and the "connective reasoning whereby the precise questions relate to it" be made known to petitioner. Id. at 214-15.

Here as in *Watkins,* "having exhausted the several possible indicia of the 'question under inquiry' we remain unenlightened as to the subject to which the questions asked petitioner were pertinent." See pp. 21-28, above and App. A. In this Court, the Government has introduced yet another theory. "Certainly, if the point is that obscure after trial and appeal, it was not revealed to petitioner when he had to decide at his peril whether or not to answer." 354 U.S. at 214. The explanations given petitioner were conflicting, but Communist infiltration of the press was not one of them. *Hearings,* pp. 1730, 1737, 1738. The confusion as to the subject of the hearings here is so glaring that there would be no need to elaborate, if the government had not asserted that petitioner nevertheless knew that to have been the subject under inquiry, Opp. cert., pp. 12, 17, 19.

The government imputes to petitioner a knowledge of the statements of the Chairman and others at the outset of the hearing, two days before he testified. (Opp. cert., pp. 11-12)[22] By a parity of reasoning, petitioner must be deemed to have heard Sourwine deny the very topic which the Government now insists petitioner knew, and to have heard Sourwine identify a different topic: Communist activity. This would take the case beyond *Watkins* and *Scull* to *Raley* v. *Ohio,* 360 U.S. 423. "Here there were more than commands simply vague or even contradictory. There was active misleading." Id. at 438.

On the day petitioner testified he heard Senator Hennings' statement, (Opp. cert. p. 12) which has been discussed above (p. 23) and also heard the Chairman say that the Committee was following up the testimony of Clayton Knowles—who had not mentioned Whitman. While the Committee heard several witnesses that day (Opp. cert., p. 12) only one preceded Whitman to the stand—Robert Shelton. See *Hearings* pp. 1717-1728. Since Shelton did not know then, and does not know to this day the reason for calling him—much less the subject under inquiry—Whitman could learn little from attending Shelton's interrogation. Indeed, the explanations given Shelton pointed to yet other subjects. See App. A at n. 7-9 and Brief for Petitioner in No. 9, pp. 17-22.

The Government relies also on petitioner's own statement to the committee. (opp. cert. p. 18, incorporated by reference, opp. cert. p. 12) Petitioner

[22] It is clear that petitioner, who had not been named by Burdett, could not have been enlightened as to the purpose of his own testimony even if he had learned that the hearings resulted from Burdett's.

wrote, "If my testimony is required in aid of the inquiry which your subcommittee is conducting with reference to the beliefs, associations and activities of individuals who are or have been connected with newspapers * * * there is grave doubt whether your Subcommittee is authorized by Congress, or entitled by the Constitution to conduct such an inquiry." *Hearings* p. 1733. Only if "beliefs, associations and activities of individuals who are or have been connected with newspapers" are equated with "Communist infiltration of the press", may knowledge of the latter subject be attributed to petitioner.[22] An inquiry into "beliefs, associations and activities" of any class of individuals would plainly have violated the First Amendment. For "the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be". *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304, quoted and approved in *Torcaso* v. *Watkins*, 367 U.S. 488, 492. Surely the Government cannot contend that the inquiry was what petitioner charged it was. Indeed, the Committee stanchly repudiated his claim that it was conducting "an inquiry into the free press". *Hearings*, p. 1730.

The Government's final reliance, on the questions put to petitioner, (Opp. cert., p. 18) is plainly misplaced in light of *Watkins*, 354 U.S. at 213-14, where only 7 of 30 questions were foreign to the alleged topic, while here more than half ranged outside the press. Having nominated numerous subjects throughout these proceedings, and "Communist infiltration of the

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[22] As this sentence is in the subjunctive, and the previous paragraph refers to petitioners' own beliefs, etc., the inference that it represents what he *knew* to be the topic is highly questionable.

press" only in this Court, the government attributes to petitioner "gifts which mankind does not possess" in asserting that the subject appeared to him with indisputable clarity at the time of the hearings. Cf. *International Harvester* v. *Kentucky*, 234 U.S. 216, 224.

The Court below failed to apply the *Watkins-Scull* principle, on the authority of its *Shelton* opinion, which in turn had relied on *Barenblatt* v. *United States*. But *Barenblatt* distinguished *Watkins* on the facts; it did not disturb the *Watkins* principle. *Id.* at 123-25, as opp. cert. p. 17 concedes. And this case is like *Watkins*, not *Barenblatt*, for Whitman was afforded no explanation of the topic under inquiry, was not identified by any previous witness, or advised why he was called. Compare pp. 3, 22-24, 43, above with 360 U.S. 124-25. Above all, Whitman, like Watkins, but unlike Barenblatt (*Id.* at 125) answered all questions about his own Party membership and limited his refusal to identifying his associates—whose pertinency remains in doubt even now.

Petitioner's statement explicitly raised the pertinency issue:

> "Neither the subpena nor the letter [continuing the subpena] stated the purpose for which my testimony is required."
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> * * * * *
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> "I respectfully submit that my private affairs, beliefs and associations are not proper subjects for investigation by this subcommittee. Their pertinence to any valid legislative inquiry is in serious doubt * * *" (*Hearings*, p. 1733)

His doubts as to why he had been called and the pertinence of the questions were repeated orally. (*Id.* at

1735) Petitioner's pertinency objection was thus much clearer than Watkins', 354 U.S. at 185, and of course, than Barenblatt's, 360 U.S. at 123. Even if the protest must be made in some form, the witness "could not be expected to speak with legal exactness" *Hale* v. *Henkel*, 201 U.S. 43, 71 (refusal to produce papers on advice of counsel that witness was, under the circumstances not obliged to produce them, held sufficient to raise Fourth Amendment defense); *Quinn* v. *United States*, 349 U.S. 155, 170. (No particular form of words required to present objection.)

III. THE SUBCOMMITTEE WAS WITHOUT AUTHORITY TO QUESTION PETITIONER; IF IT HAD AUTHORITY IT WAS NOT MADE KNOWN TO HIM.

A. The Subcommittee's Lack of Authority to Conduct This Inquiry

The indictment alleges that the Subcommittee's hearings were conducted pursuant to Section 102(1)(k) of the Legislative Reorganization Act of 1946 and Senate Resolutions 366 of the 81st Congress and 58 of the 84th. The Legislative Reorganization Act creates and continues the Standing Committees of both Houses of Congress and defines their jurisdiction. Section 102(1)(k) describes the powers of the Senate Judiciary Committee. Neither Section 102(1)(k) nor any other section of the Act gives any powers to the Internal Security Subcommittee or any other subcommittee of a standing committee. The Senate Resolutions referred to in the indictment make no mention of the Internal Security Subcommittee. This was no accident. The Judiciary Committee resolved that the Internal Security Subcommittee be continued and that "an appropriate original resolution" be reported to the Senate for that purpose (Gov't Ex. #3); such a resolution—

referring to the Subcommittee by name—was introduced. However, the Rules Committee expressly changed its language to read "the Judiciary Committee or any subcommittee thereof", and it was passed in this form. 101 Cong. Rec. 3174-5. The Rules Committee's purpose was plainly to restrict the delegation from the Senate to the Judiciary Committee, consistent with the general policy that only Standing Committees are empowered directly by the Senate. Since members of standing committees are elected by the respective bodies and members of subcommittees are chosen informally, either by the Committee or its Chairman (as here, JA 18) this distinction is substantial. The Rules Committee deemed it sufficiently important to alter the language of the resolution in order that the authority of the Senate should run directly to the Judiciary Committee which was in turn required to empower "any subcommittee" to investigate the Internal Security Laws, etc., as Sen. Eastland acknowledged.[24] There is nothing in the record that the Judiciary Committee ever did so, although its intention can perhaps be divined from Ex. #3. What is clear is that the Resolution relied on in the indictment did not authorize—indeed it deliberately denied authority to—the Internal Security Subcommittee to undertake *any* investigation.

In view of the ambiguity of clause (3) of the Resolutions there is no way of knowing whether the Senate authorized the particular inquiry in this case. In *Watkins*, 354 U.S. 178 at 205 this Court held that

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[24] During the same debate Sen. Eastland, justifying a request for additional appropriations pointed to new procedures adopted by the Subcommittee at the instance of the full committee. 101 Cong. Rec. 3175.

"Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need." *Barenblatt*, 360 U.S. 109 did not refute this proposition. See *Wilkinson*, 365 U.S. at 407. Rather, *Barenblatt* held that such authorization can be found in the "legislative gloss" of the Committee's history. *Id.* at 117-22. Even if there is a similar gloss here, as is argued at opp. cert. pp. 10-11, it is clear from the foregoing that the authorization was from the Senate to its Judiciary Committee. That Committee's resolution in Ex. #3, even if had been revived after the passage of S. Res. 58, states nothing about an investigation into "Communist infiltration of the press", or any other subject. If the Subcommittee's authority is defined in that resolution *none of the questions which are the subject of this indictment were authorized.* For that resolution refers only to the Administration of the Internal Security Act and Other Internal Security Laws (Compare clauses (1) and (2) of Resolutions 366 and 58) each of which was passed after petitioner left the Communist Party and after the time encompassed in those questions.

Finally, the record leaves no doubt that the Subcommittee itself never met to authorize this inquiry. Sen. Hennings so stated, without contradiction. *Hearings*, p. 1588. Its rules require the approval of a majority of the subcommittee before any "major investigation" is undertaken. See R. No. 9, p. 140. When thirty witnesses are called for a series of hearings, and eighteen of them are recalled, we think that this is a "major investigation" by any reasonable definition. (But see the testimony of Sourwine, J.A. 37.)

In that event the *Accardi-Service-Vitarelli*[25] principle would require the Subcommittee to follow its own rules. We see no tenable distinction between Executive departments and Congressional committees and subcommittees in the application of that principle. Indeed, the abandonment of the rule is more serious here, since the revision of the rules was at the behest of the parent committee, and the Senate had been advised of the fact, though not the substance of changes 101 Cong. Rec. 3175, n. 24 *supra*.[26]

Even in the absence of a rule such as the Subcommittee's we submit that an inquiry that is not voted by a majority of the Subcommittee may not compel testimony. Unless the Subcommittee has acted there is a break in the chain of authority from the House or Senate through the Standing Committee to the Subcommittee. This is not a technical notion. *Watkins, supra* at 200-01. The record shows that this investigation was instituted and executed by the Counsel of the Subcommittee with only minimal supervision from one Senator (the Chairman) and without the knowledge of the rest of the Subcommittee, or the Judiciary Committee, which was responsible to the Senate, which alone has plenary authority under the Constitution. To give one individual, who is without a mandate from or responsibility to the people, such

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[25] *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535.

[26] Moreover, the rule was plainly intended to protect the right of all members to participate in the decision to conduct any investigation, thus going beyond a self-imposed restriction on the power of a cabinet member as in the cases cited in the previous note. The record shows that Sen. Hennings was gravely concerned about some of the proceedings but was powerless to interfere once the witnesses had been called.

power to interfere with the privacy of the citizen is a dangerous affront to liberty unjustified by any countervailing legislative need.

B. The Committee Failed to Reveal the Source of Its Authority

The holding of *Watkins* v. *United States,* 354 U.S. 178, that a witness is entitled to be informed of the subject under inquiry and the relation of the individual questions to that subject was derived from two principles: 1) that a citizen has "the right to have available, through a sufficiently precise statute, information revealing the standard of criminality before the commission of the alleged offense" and 2) the pertinency of the questions is part of the standard of criminality under 2 U.S.C. § 192. *Id.* at 208. When the settled proposition that the authority of the committee is also part of that standard (*United States* v. *Rumely,* 345 U.S. 41; *Sacher* v. *United States,* 356 U.S. 576; *Barenblatt* v. *United States,* 360 U.S. 109, 116-123) is substituted for the minor premise in this syllogism, a conclusion parallel to the *Watkins* holding is compelled: ***A witness may not be convicted for a violation of 2 U.S.C. § 192 unless he is apprised of the basis of the investigating committee's authority to question him.***

The precise outlines of the obligation which this rule imposes on a committee need not be traced here; at a minimum the committee must reveal to the witness the source of its authority and the relationship of the inquiry and the individual questions to that authorization. On this record it is plain that the Committee failed to comply with either of these conditions of due process.

The subpoena which "commanded" Whitman's appearance invoked "lawful authority" but failed to define it. At no time during the hearings—in petitioner's presence or his absence—did any member or representative of the Sub-committee refer to Senate Resolution 366 or 58 or to any other alleged source of power to compel his testimony.

If petitioner had been made aware of the resolutions which are the Government's main reliance here, he still could not have determined whether they authorized the particular inquiry which was being conducted, and whether they authorized the committee to coerce him to inform against his associates in past lawful political activity. The courts cannot decide whether an interrogation is authorized unless they know the subject under inquiry (*Wilkinson* v. *United States*, 365 U.S. at 409); neither can a witness, who must decide at his peril, subject to the stresses of a Committee interrogation. That this witness did not and could not know the subunder inquiry has already been amply demonstrated. (pp. 21-26, 43-45 supra).

Even if the subject under inquiry had been identified, Whitman would have been unable to calculate whether he was free to decline to answer. For, as we have already noted, and as we understand the government to have conceded in the *Sacher* case,[27] Resolutions

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[27] "Petitioner, referring to Senate Resolution 366 . . . creating the Internal Security Subcommittee, argues . . . that 'a claim that the resolution clarify the pertinency of the questions would be absurd'. Of course, we make no such claim. The resolution, defining the general boundaries of the Subcommittee's jurisdiction, authorized and empowered the committee to undertake the inquiry in which it was engaged when Matusow originally testified before it . . . as well as the inquiry into the circumstances surrounding

366 and 58 are so vague that a witness cannot understand whether they encompass any given topic or individual questions. See pp. 47-48 *supra*. Yet, "the scope of inquiry that a committee is authorized to pursue must be defined with sufficient uambiguous clarity to safeguard a witness from the hazard of vagueness . . . against which the Due Process clause protects." *Watkins* v. *United States,* 354 U.S. at 217 (concurring opinion).

In his prepared statement, and orally, petitioner clearly and insistently questioned the Committee's authority to interrogate him as it did. (*Hearings*, p. 1733-34, 1735, 1737). Since the Committee failed to apprise him of purported foundation of its power to compel his testimony petitioner was "not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process clause of the Fifth Amendment." *Watkins, supra* at 215.

IV. PETITIONER WAS JUSTIFIED BY THE FIRST AMENDMENT IN REFUSING TO ANSWER THE QUESTIONS ASKED HIM.

As early as *Burnham* v. *Morrissey,* 14 Gray 266 (Mass.), Chief Justice Shaw held that

> "The [Massachusetts] House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the citizen are concerned, but the legality of its action may be determined by this Court."

Matusow's later recantations of that testimony, but the pertinency of the questions which petitioner refused to answer during the course of the latter inquiry is to be determined, as it is proper to do (*Watkins* v. *United States,* 354 U.S. 178), from the entire complex of circumstances attending their asking." Brief for the United States in Opposition, *Sacher* v. *United States,* No. 828, October Term, 1957, p. 16, n. 6.

Nor has any subsequent case cast doubt on the rule in *Kilbourn* v. *Thompson,* 103 U.S. 168, 181 that

> "Conceding for the sake of argument that there are cases in which . . . the Congress of the United States may punish for contempt of its authority, or disregard of its orders, it will scarcely be contended by the most ardent advocate of their power in that respect that it is unlimited."

And see *Sinclair,* v. *U. S.,* 279 U. S. 263, 292; *Quinn* v. *U. S.,* 349 U. S. 155, 161; *U. S.* v. *Rumely,* 345 U. S. 41, 44, 56; *Watkins* v. *United States,* 354 U. S. 178, 198.

Barenblatt v. *U. S.,* 360 U. S. 109 teaches that "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs" (*Sinclair, supra,* at p. 292) is to be weighed in the light of the competing public and private interests at stake. Unlike our earlier argument with reference to pertinency, which involves a problem of statutory construction, this is, as this Court pointed out in *Barenblatt,* a problem of Constitutional adjudication. And unlike *Barenblatt,* we say that in this case the Congressional and public interest in disclosure was *de minimis* and the "personal and private" interest of the witness was very great.

Petitioner, like Watkins and Deutch, but unlike Barenblatt, Wilkinson and Braden, discussed fully his own membership in the Communist Party and refused only to give information which would reveal the identity of his associates. We submit that the distinction is one which goes to the heart of the associational rights which are guaranteed by the First Amendment.

See, e.g. *De Jonge* v. *Oregon*, 299 U.S. 353; *Scull* v. *Virginia*, 359 U.S. 344.[28]

This Court has recognized the difference between the hard core conspiratorial leadership of the Communist Party, and the hundreds of thousands of well-intentioned law-abiding citizens whose membership was overt and not conspiratorial, and who believed it to be, and participated on the basis that it was, a lawful political party. *Konigsberg* v. *State, Bar* 353 U.S. 252; *Schware* v. *Bar Examiners*, 353 U.S. 232; *Wieman* v. *Updegraff*, 344 U.S. 183. See also authorities cited in Brief for Petitioner, *Deutch* v. *United States* No. 233 Oct. Term, 1960, p. 45, n. 17. Petitioner testified, and offered to prove at trial that his own activity, and that of his associates consisted entirely of lawful political activity, entirely unconnected with overthrow of the government (JA 39-52). He told the Committee that he had "never taken part in any conspiracy." *Hearings* p. 1738. Of course, petitioner's First Amendment rights must be judged on the basis of his own conduct and that of his associates. *Wieman* v. *Updegraff*, *supra*; *Scales* v. *United States*, 367 U.S. 203, 224-25. It is entirely plain that he was unable to give any information to the committee that would enable it to ferret out subversion of the press, espionage, sabotage or attempts to overthrow the government. Our discussion with reference to pertinency (pp. 28-42 supra) has application here as well. *Scull* v. *Virginia*, 359 U.S. 344,

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[28] This point has previously been ably briefed by counsel for petitioners in *Watkins* and *Deutch*. We shall not burden the Court by repetition of their arguments, but respectfully incorporate them by reference in our discussion herein. See Brief for Petitioner, No. 261, Oct. Term 1956, pp. 96-119; Brief for Petitioner, No. 233, Oct. Term 1960, pp. 44-50.

352-53. It demonstrates that the public interest to be served by compelling petitioner to inform approaches, if it does not equal, zero.

At no time did any member of the Committee, or its Counsel, attempt to set forth the value to the Congress or the public of the disclosure of the names of persons who, many years before, had engaged in lawful rather than conspiratorial activity.

The petitioner's interest in non-disclosure was as urgent as the Government's interest in answers was fragile. Having answered all questions concerning himself and his activities, his reason for refusing to answer was that "I knew of my own knowledge of people who had lost jobs, whose careers had been wrecked, whose families had been upset, whose children had been dislocated, purely because they had been exposed to the committee by somebody for what in its time was perfectly legal activity and I felt that it would be a mean and ignoble thing if I would be the vector, the agent to bring destruction on people. . . ." (JA 53).

Precisely such consequences were held to privilege non-disclosure of associations in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; *Bates* v. *Little Rock*, 361 U.S. 515; and *Shelton* v. *Tucker*, 364 U.S. 479.[20] That individ-

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[20] In *Communist Party* v. *Control Board*, 367 U.S. 1, these cases were said to "hold that where the required making public of an organization's membership lists bears no rational relation to the interest which is asserted by the State to justify disclosures, and where because of community temper publication might prejudice members whose names were revealed, disclosure cannot be constitutionally compelled." Id. at 101.

The Government argues that this case is like *Bryant* v. *Zimmerman*, 278 U.S. 63 rather than *N.A.A.C.P.* and its progeny.

uals whose past membership in the Communist Party is exposed may suffer serious social and economic injury is indisputable. Cf. *Schware* v. *Bar Examiners,* 353 U.S. 232; *Konigsberg* v. *State Bar,* 353 U.S. 252; *Greene* v. *McElroy,* 360 U.S. 474; Cogley, *Report on Blacklisting* (1956); Cushman, *Civil Liberties in the United States,* pp. 203-204 (1956).

In the circumstances no one, we feel, can challenge the purity, and to many citizens, the laudability, of this challenge to the Committee's authority. "... it seemed to me that one of the great heritages and privileges that I had as a citizen in a democracy was that of personal responsibility for my acts ... I felt sir, that as a matter of inner conscience here, that I could not disclose the names of innocent people in order to be of possible benefit to myself."

We suggest that no more compelling private interest will ever be found. Witnesses may refuse to answer questions out of shame, or from fear, or mere contumacy, or outright defiance; it is probably true that most refusals to answer stem from ignoble considera-

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Opp. cert. p. 16, n. 10. But the suggestion that *Bryant* applies because this case involves membership in the Communist Party (id.) is too facile. In *Communist Party* v. *Control Board* the distinction was in terms of the "nature of the organization regulated, and hence the danger involved in its covert operation," 367 U.S. 1 at 101. Where "secrecy itself is made an active instrument of public harm" exposure serves a public purpose. But the activities of petitioner and his associates were, as he offered to prove, not secret. They consisted principally of attendance at public meetings which were open to anyone who wished to attend. There was nothing clandestine about petitioner's membership in the Communist Party, he and his associates used their right names at all times, and his friends and associates knew that Whitman was a member. (JA 47).

tions. But the person of conscience, high principle, and imagination, which we feel petitioner by his acts demonstrated himself to be, will not consent to yield his personal integrity to the tug of a meddling officialdom. We assert that no private interest can rise in dignity and selflessness above this. If the desire to protect innocent persons from unjustified harm is not sufficient a private interest to warrant silence, then we say that the First Amendment can under no circumstances be a shield, that *Barenblatt* means that any public interest, no matter how trivial or remote, can always prevail over every private interest in non-disclosure, and that Congressional committees have a license to hunt where they will. This Court has never so held, and we trust it never will.

The case most closely touching this is not *Barenblatt,* but *Board of Education* v. *Barnette,* 319 U.S. 624. There as here the State, asserting an overriding interest, sought to compel an act contrary to the citizen's conscientious scruples. Petitioner's principles and tenets, which would have been violated had he accepted the role of an informer, have deep roots[30] and rise to at least an equal dignity to the grounds on which the children in the *Barnette* case refused to salute the flag. Similarly, the Committee's interest in learning the names of petitioner's associates, even if hospitably viewed, is insignificant compared to the interest in national unity—during wartime—which was held to be insufficient to outweigh the First Amendment in *Barnette.*

Barenblatt, supra at p. 127, makes it entirely clear that the force of these countervailing private and pub-

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[30] "The talebearer shall defile his own soul, and be hated by all" *Book of Ecclesiastes,* xxi, 31.

lic interests is to be judged in the "particular circumstances shown." We do not ask this Court to lay down any sweeping rule that informer questions may never be pertinent or that they necessarily intrude on rights protected by the First Amendment. We urge that the public interest, in these "particular circumstances," in procuring answers was so remote and feeble as to be entirely outweighed by the petitioner's altogether understandable compulsion not "to become in my own eyes an ignominious person . . . I feel deeply that I would utterly lose my self-respect were I to violate the terms of my own inner integrity." We believe that the First Amendment does not permit that this be rendered up to Caesar. The petitioner's humane decency is a value more rare and precious, more deserving of respect and cultivation, than is the petty sadism of the officious inquisitor, quietly rubbing pepper in the eyes of his prisoners.

V. THE INDICTMENT WAS INSUFFICIENT TO STATE AN OFFENCE.

The indictment omitted to define the question under inquiry, the basis of pertinency of the individual questions or the authority of the subcommittee. In each of these elements it failed to meet the requirement of Rule 7(c) of the Federal Rules of Criminal Procedure that "the indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

The underlying principles regarding the sufficiency of an indictment are developed by petitioner in *Russell* v. *United States*, No. 8, this Term, and, in deference to the convenience of the Court, will not be elaborated here.

It bears emphasis, however, that Rule 7(c) is unique in that it embodies two constitutional principles: (1) a defendant in a criminal case must be "informed of the nature and cause of the accusation" (Sixth Amendment, incorporated also in the due process clause of the Fifth[21]); (2) "none shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury" (Fifth Amendment). The constitutional provision for notice means that "an indictment must charge an offense with such reasonable certainty that the accused can make his defense." *United States* v. *Lattimore*, 215 F. 2d 847, 849 (CADC) citing *United States* v. *Cruikshank*, 92 U.S. 547. And "No person shall be required according to the fundamental law of the country . . . to answer for any of the higher crimes unless this body [the grand jury] shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." *Ex Parte Bain*, 121 U.S. 1, 11 quoted with approval in *Stirone* v. *United States*, 361 U.S. 212, 218, n. 3.[22]

We shall now show that the indictment in this case thwarts both constitutional policies which Rule 7(c) intended to serve.

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[21] *DeJonge* v. *Oregon*, 299 U.S. 353; *Cole* v. *Arkansas*, 333 U.S. 196.

[22] We need not consider, in construing Rule 7(c), whether the Constitution requires an indictment in a prosecution for violation of 2 U.S.C. § 192. For this rule establishes the same standard of a "plain, concise and definite written statement of the essential facts" for both an indictment and an information.

(a) The "Question Under Inquiry"

An indictment which fails to identify the "question under inquiry" by which the prosecution will contend pertinency is to be measured is almost useless to give notice to a defendant in a prosecution under 2 U.S.C. § 192. In *Wilkinson* v. *United States*, 365 U.S. 399, 409 this Court delineated five issues which can be considered only if the "question under inquiry" is known.[33] Even if one or more of these is a matter of defense in individual cases, two are indispensible elements which the Government must affirmatively establish in every case—the authority of the Committee to conduct the inquiry and pertinency of the individual questions. *United States* v. *Rumely*, 345 U.S. 41; *Sacher* v. *United States*, 356 U.S. 576; *Deutch* v. *United States*, 367 U.S. 456. He must be given the opportunity to meet the allegation that the question under inquiry was the one relied on by the government to prove these elements of the offense. That the identity of the question may be critical is demonstrated by *Deutch* v. *United States*, 367 U.S. 456, where the difference in conclusion between the majority opinion of Mr. Justice Stewart and the dissenting opinion of Mr. Justice Whittaker resulted from their disagreement as to the question under inquiry.[34] A fact which controls five issues in the case, and which may be dis-

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[33] "First, was the subcommittee's investigation of these subjects, through interrogation of the petitioner, authorized by Congress? Second, was the subcommittee pursuing a valid legislative purpose? Third, was the question asked the petitioner pertinent to the subject matter of the investigation? Fourth, was he contemporaneously apprised of the pertinency of the question? Fifth, did the subcommittee's interrogation violate his First Amendment rights of free association and free speech?"

[34] Compare 367 U.S. at 469-70 with *id.* at 481.

positive of the outcome is plainly an "essential fact constituting the offense charged" which Rule 7(c) requires to be stated in the indictment.

This case and its companions dramatically illustrate the importance of defining the "Question under inquiry" in the indictment. The vacillations of the Government as to this issue from trial to appeal to the petition for certiorari, whose prejudicial effect is clear,[35] would have been averted if the indictment

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[35] The harmful consequences of the variance between the government's positions at trial and on certiorari are outlined at p. 28 *supra*. Moreover, since the lower courts entered and affirmed the conviction on grounds other than that "communist infiltration of the press" was the "question under inquiry" they would have been compelled to acquit petitioner if that topic had been specified in the indictment.

The Government contends that "since during petitioner's own testimony both he and the subcommittee made clear that they understood that Communist infiltration of the press was the subject under inquiry * * * he could not have been prejudiced by the lack of greater specificity." Opp. cert. p. 19. Perhaps the least vice of this argument of desperation is that its factual predicate is false. See pp. 21-26, 43-45 *supra*, showing that petitioner had no such knowledge. If he had possessed the information ascribed to him, he knew more about the Committee's purposes than its counsel (who had stoutly denied this topic, and claimed a different legislative purpose) or the prosecuting attorney (who insisted that there was no such narrow topic) or the Trial Judge (who convicted on the assumption that the Committee was investigating "the history of the Communist Party" and its activities, J.A. 55).

A more fundamental objection is that the Government is trying to lift itself by its own bootstraps. Petitioner's knowledge, and whether he was properly apprised of the subject, were issues at the trial. Compare *Barenblatt*, 360 U.S. 109, 124-25 with *Watkins*, 354 U.S. 178, 214-15. The identity of the question under inquiry is critical to this issue as well. *Wilkinson*, 365 U.S. 399, 409, quoted at n. 33 *supra*. Thus, the Government's blithe assumption that petitioner knew the subject under inquiry and was therefore not injured by the open-ended indictment serves rather to accentuate the severity of its prejudice to his defense.

had specified the topic. *Stirone* v. *United States*, 361 U.S. 212, teaches that a variance between the indictment and the proof would vitiate the conviction, as the Government virtually concedes. Supplemental Memorandum for the United States (on Pet. for Cert.), *Shelton* v. *United States*, No. 9, this Term, p. 5, n. 3. If, as the Government claims in *Shelton*, it is not bound by the bill of particulars, and the bill can subsequently be reinterpreted on the basis of what the Assistant United States Attorney "apparently meant" *id.* p. 4, there is all the more reason for requiring the government to state the subject in the indictment, by which it is bound. If, as said in *Wilkinson*, 365 U.S. at 407 and reaffirmed in *Deutch*, 367 U.S. at 469 the "starting point" of analysis is to determine the subject of the investigation an indictment which leaves that subject unclear severely frustrates the defense. Moreover, if we are correct in asserting (pp. 20-28 *supra*) that the question under inquiry is itself an element of the offense which must be proven, the government's obligation to allege the question is incontrovertible.

An indictment which leaves the question under inquiry open also destroys "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury . . . . The very purpose of [this] requirement is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U.S. 212, 217-18. If this Court must first determine the question under inquiry to determine whether the committee was acting within its authority and whether the questions were proven to be pertinent, must not the Grand Jury know the question in order to determine probable cause

that a violation was committed? "The grand jury might not have been willing to return an indictment with a charge conforming to the proof actually introduced". Supplemental Memorandum for the United States, *Shelton* v. *United States,* No. 9, this Term, p. 5, n. 3. Indeed, it is readily inferable that the Grand Jury's understanding of the "question under inquiry" differs from the theory by which the Government here seeks to preserve the conviction. The Assistant United States Attorney tried each of the New York *Times* cases on the hypothesis that the subject under inquiry was as broad as the authorizing resolution. He so advised the Courts and the defendants. See Appendix A, text and notes at n. 16-21. It is inconceivable that he informed the Grand Jury that "communist infiltration of the press" or any other limited topic was the real question under inquiry.

(b) The Pertinency of the Individual Questions

The need for an explanation of the pertinency of the individual questions is perhaps not as clear as that of a definition of the topic under inquiry. However, the conflicting views of the trial court and the Court of Appeals as to the basis of Question 8, both of which differ from petitioner's assumption (see p. 40, *supra*) illustrate the hazards of leaving this matter open. And, of course, the Grand Jury must have a theory of pertinency in order to determine probable cause.

(c) The Authority of the Subcommittee

Since the authority of the subcommittee is an element of the offense, the basis of that authority must be pleaded, *United States* v. *Lamont,* 236 F. 2d 312 (C.A. 2) so holds, and we do not understand the government to dispute it.

It is true, as the government says (opp. cert. p. 19, n. 14) that the indictment states that the hearings were conducted pursuant to Resolutions 366 of the 81st Congress and 58 of the 84th. Our point is that the prosecution may not go beyond these allegations, as it attempted to do by the testimony of Sourwine regarding Ex. 3 and the minutes of the Judiciary Committee, etc. (See J.A. 15-22) "An allegation for lack of which the prosecution must evidently and as a matter of law fail cannot be regarded as superfluous." *Lamont*, supra at 315. As in *Lamont* "There is no allegation in the indictments here linking the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee." *Id.* For the resolutions cited in the indictment give no authority to the subcommittee to conduct this or any other inquiry. See pp. 46-50, *supra*. Thus, the indictment simply failed to state an offense.

A holding that indictments must define the question under inquiry and the pertinency of the individual questions and must state fully the alleged basis of the subcommittee's authority would create no difficulties for the prosecution of contempts of Congress. Such prosecutions presume a citation by a House of Congress at the request of the affected Committee.[36] That Committee's report can readily state the question under inquiry and the purpose of the individual questions which are the basis of the citation. It will be impossible for the Government to comply only if there was no "question under inquiry". We suspect that this is the real first cause of the Government's difficulties in the New York *Times* cases. But the com-

[36] See, e.g., Gov't Ex. 6 which is the Judiciary Committee's report in this case.

mittee's power to compel a response is predicated on the existence of a "question under inquiry", a legislative purpose for the separate questions and authorization of the inquiry. Thus, if this Court holds that indictments under 2 U.S.C. § 192 must fully plead these elements it will inhibit only invalid prosecutions. But it will assure that in "fulfillment of their obligation under this statute the courts [will] accord to the defendants every right which is guaranteed to defendants in all other criminal cases." *Watkins* v. *United States,* 354 U.S. 178, 208; *Deutch* v. *United States,* 367 U.S. 456, 471.

CONCLUSION

By reason of the foregoing the judgment of conviction should be reversed.

Respectfully submitted,

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APPENDIX A

SUMMARY OF ALLEGED QUESTIONS UNDER INQUIRY

	SHELTON	WHITMAN	PRICE	PECK
STATEMENTS OF COMMITTEE MEMBERS BEFORE HEARINGS (Not in Presence of Present Petitioners)	"Subsequent chapter to the Burdett testimony[1]—"not an attack upon the free press"[2]—attempt of Communist party to influence or subvert American press[3]—"We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it"[4].			
STATEMENTS BY COMMITTEE COUNSEL SOURWINE TO OTHER WITNESSES	*Not* investigation into "Communist infiltration of the press and other forms of communication"[5]—"the subject matter of the Committee's inquiry is Communist activity"[6].			
STATEMENTS BY COMMITTEE TO WITNESSES (Open Hearings)	"Your employment"[7]—"Whether you are a member of the conspiracy to destroy the government of the United States"[8]—credibility of witness[9].	"Your standing and influence in the organization" [New York Times][10]—membership of Communist cell in New York City in 1930's[11]—"who your associates were in the Communist Party"[12].	To qualify witness to answer questions regarding slate of candidates in Newspaper Guild election[13]—testing the credibility of the witness.[14]	No explanation to witness.[15]
INDICTMENTS	Question under inquiry not stated.	Question under inquiry not stated.	Question under inquiry not stated.	Question under inquiry not stated.
STATEMENTS OF PROSECUTOR	"the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted. This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose."[16]	Communist activities in New York area in the field of strategy and tactics of world communism—"internal security and national security of the United States"[17].	"rout out communists and locate them wherever they are"[18]—"find where communists were, wherever they may be found"[19]. Powers of subcommittee "at least as broad as any that the full committee had already and perhaps a little more broad"[20].	"'The full committee powers' or the entire scope of the authorizing resolution"[21].
TESTIMONY OF COMMITTEE COUNSEL	"extent and activities of the communist conspiract against the United States, more specifically, as it applied to New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees."[22] "Communist activity and infiltration of mass communications in New York City".[23]	Communist espionage—operations of the Communist Party—strategy and tactics of world communism particularly in area of mass communications[24]—conspiracy to overthrow the government of the United States by force and violence[25].	Strategy and tactics of Communist Party[26]—important whether witness had signed in 1941 a statement in defense of the Communist Party[27]—Not lawful political activities of members of Communist Party[28].	"We were after each Communist cell that we could find in any industry in the United States, and we were after them to get a picture of it as a basis for legislation"[29].
DETERMINATIONS BY TRIAL COURTS	"extent and nature of communist infiltration into news dispensing agencies"[30].	"the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party	Court refers only to "the internal security; in fact the national security, of this country"[31].	"Communist infiltration into mass communications".[32]

DETERMINATIONS BY TRIAL COURTS	"extent and nature of communist infiltration into news dispensing agencies"[30].	"the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party and the legislative means that might be appropriate for dealing with such activities"[31].	Court refers only to "the internal security; in fact the national security, of this country"[32].	"Communist infiltration into mass communications".[33]
GOVERNMENT BRIEFS IN COURT OF APPEALS	Government relies entirely on Senate resolution and statements made before the hearings[34].	Communism[35].	Government relies entirely on Senate resolution and statements made before the hearings[36].	Acquitted.
DECISIONS OF COURT OF APPEALS	"infiltration of Communists into the radio, TV, and the press."[37]	Mechanics of party membership[38].	Not stated[39].	Acquitted.

[1] Hearings, page 1587.
[2], [3], [4] Ibid.
[5] Hearings, page 1616 (colloquy during testimony of James S. Glaser).
[6] Hearings, page 1652 (colloquy during testimony of Jerry Zalph).
[7] Hearings, page 1721 (R. No. 9, page 85).
[8] Hearings, page 1725 (R. No. 9, page 91).
[9] Hearings, page 1727 (R. No. 9, page 93).
[10] Hearings, page 1730.
[11] Hearings, page 1737. Chairman stated this to be "The very heart of this inquiry."
[12] Hearings, page 1738.
[13] Hearings, page 1681.
[14] Hearings, pages 1695–6.
[15] Hearings, pages 1774–1784.
[16] Prosecutor's oral Bill of Particulars (R. No. 9, page 20). See also R. 17–18, 40.
[17] Transcript *United States* v. *Whitman* (Criminal 1213–56 DC DC) p. 6.
[18] Joint Appendix (J.A.) No. 12, p. 133.
[19] Id., p. 134.
[20] Id., p. 49.
[21] Quote in *United States* v. *Peck*, 154 F. Supp. 603, 610, note 25.
[22] R. No. 9, page 139.
[23] R. No. 9, pages 156–7.
[24] J. A. No. 10, p. 31.
[25] Id., p. 32–33.
[26] J. A. No. 12, p. 54.
[27] Id., p. 103. (See also pp. 117–18, 127 and 128.)
[28] Id., p. 85.
[29] Transcript in *United States* v. *Peck*, Criminal 1214–56, page 235 (testimony of Senator Eastland, Chairman of Committee).
[30] R. No. 9, pages 224–5.
[31] J. A. No. 10, p. 54–55.
[32] Tr. 331-2 of trial record in *United States* v. *Price* (DCDC).
[33] *United States* v. *Peck*, 154 F. Supp. 603, 610, note 25.
[34] Brief for Appellee, *Shelton* v. *United States* (CADC 13737, pages 2–4).
[35] Brief for Appellee, *Whitman* v. *United States*, (CADC 15416, pages 10–11, 13, 14).
[36] Brief for Appellee, *Price* v. *United States*, (CADC 13925, pp. 2, 4 and 20).
[37] R. No. 9, page 243.
[38] *Whitman* v. *United States*, 291 F. 2d 59, 61. This determination was made with regard to question no. 8 in the indictment. The Prosecutor had told the District Court that the purpose of this question was to test the credibility of the witness. The Court of Appeals did not state what it believed was the purpose of the inquiry generally.
[39] Compare *Deutch* v. *United States*, 367 U.S. 456, 467.

APPENDIX B

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law • • • abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be • • • deprived of life, liberty or property without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right • • • to be informed of the nature and cause of the accusation • • •."

Rule 7(c) Federal Rules of Criminal Procedure, provides in pertinent part:

> "The indictment or the information shall be a plain concise and definite written statement of the essential facts constituting the offense charged. . . ."

2. U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress

to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the World Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"*Resolved,* That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

Senate Resolution 58, 84th Cong., 1st Sess. provides:

"*Resolved* that in holding hearings, reporting such hearings, and making investigations as authorized by section 134 of the Legislative Reorganization Act of 1946, and in accordance with its jurisdiction specified by rule XXV of the Standing Rules of the Senate, insofar as they relate to the authority of the committee to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, it Territories and possession, including but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist move-

ment or any other movement seeking to overthrow the Government of the United States by force and violence, the Committee on the Judiciary, or any subcommittee thereof, is authorized from March 1, 1955, through January 31, 1956 (1) to make such expenditures as it deems advisable; (2) to employ on a temporary basis such technical, clerical, and other assistants and consultants as it deems advisable; and (3) with the consent of the heads of the department or agency concerned, to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Government.

SEC. 2. The expenses of the committee under this resolution which shall not exceed $260,000 shall be paid from the contingent fund of the Senate by vouchers approved by the chairman of the committee.

SEC. 3. This resolution shall be effective as of March 1, 1955."

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First Amendment	2, 8, 14–15, 16, 25–27, 29, 41, 47
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Miscellaneous:	
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Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, U.S. Senate:	
Strategy and Tactics of World Communism, 84th Cong., 1st Sess., Part 14	3, 4
Strategy and Tactics of World Communism, 84th Cong., 2d Sess., Part 17	5, 24, 39
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Minutes, Committee on the Judiciary, 84th Cong.:	
January 20, 1955	22
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 10

ALDEN WHITMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The oral opinion of the district court (J.A. 54–55) is not reported. The opinion of the court of appeals (R. 1–3) is reported at 281 F. 2d 59.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1960 (R. 4). The petition for a writ of certiorari was filed on August 5, 1960, and granted on June 19, 1961 (R. 4; 366 U.S. 959). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the hearings of the Senate Internal Security Subcommittee at which petitioner appeared were properly authorized.

2. Whether the Subcommittee's investigation into Communist activities in the news media field violated petitioner's rights under the First Amendment.

3. Whether petitioner raised the issue of pertinency at the time he refused to answer the questions and, if not, whether he can claim that he was not apprised of their pertinency for the first time at his trial.

4. Whether the questions petitioner refused to answer were pertinent to the subject under inquiry.

5. Whether petitioner can raise the issue whether the Subcommittee apprised him of the source of its authority for the first time at his trial and, if he can, whether the Subcommittee was required to apprise petitioner of the source of its authority.

6. Whether the indictment was invalid because it failed to specify the subject under inquiry and the pertinency of the questions to that subject, and did not state the delegation of authority from the parent committee to the Subcommittee.

STATUTE, RESOLUTION, AND RULE INVOLVED

Section 192 of Title 2 U.S.C., Senate Resolution 366, 81st Cong., 2d Sess., and Rule 7(c) of the Federal Rules of Criminal Procedure are set forth in the appendix to petitioner's brief at pp. 3–5.

STATEMENT

Petitioner was charged in a nineteen-count indictment (J.A. 4–6), returned in the District Court for the District of Columbia, with having refused, in violation of 2 U.S.C. 192, to answer nineteen questions asked him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Com-

mittee on the Judiciary. Petitioner was found guilty by the court on all the counts (J.A. 54–55) and was sentenced to serve six months' imprisonment, which was suspended, and to pay a fine of $500 (J.A. 62–63). The judgment of the trial court was affirmed by the court of appeals (Pet. App. 1a–3a).

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Internal Security Subcommittee heard the testimony of Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws (Tr. 173–174); Hearings on *Strategy and Tactics of World Communism,* Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, U.S. Senate (hereinafter designated "Hearings"), 84th Cong., 1st Sess., Part 14, pp. 1324–1363). Burdett, who said that he had been a member of the Communist Party from 1937 until the early 1940's, testified concerning attempts by the Communist Party to influence public opinion by infiltration of Party members into the newspaper field. He stated that he became a member of the Party's unit in the Brooklyn Eagle in 1937 while employed by that newspaper (Hearings, Part 14, p. 1324); that the unit included several reporters and editorial writers (*id.* at pp. 1325–1327, 1359–1360); that Party leaders induced him to become a foreign correspondent for the Eagle in order to use his position to act as an espionage agent for the Soviet Union and that he continued these activities while subsequently employed by Transradio

Press and the Columbia Broadcasting System during World War II (*id.* at pp. 1328–1341, 1347–1353); and that employees of other New York newspapers had been Party members around 1940 (*id.* at pp. 1360–1363).

The counsel of the Subcommittee testified at petitioner's trial concerning the reason petitioner was subpoenaed to testify. At the time petitioner was subpoenaed, the Subcommittee had information that petitioner had been active in the Communist Party in Connecticut in the mid-thirties; that he had been an official of the American Committee for the Protection of the Foreign Born, which organization had been cited by the Attorney General as a Communist-front organization; that he had been an executive secretary of the New York Committee for the Protection of the Foreign Born, which had also been cited by the Attorney General as a Communist-front; that he had been connected with a magazine called "Science and Society," which was part of a scheme to recruit teachers from American universities and colleges into the Communist Party; and that he had been employed by TASS, the Soviet news agency, which the Subcommittee believed to be a cover for Soviet espionage[1] (J.A. 10–12).

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[1] On February 8, 1956, the Subcommittee heard testimony from Yuri Rastvorov, who was until 1954 a Lieutenant Colonel in the Soviet Secret Police and Intelligence Service, that 85 or 90 percent of persons employed outside the Soviet Union by TASS belonged to the Soviet Intelligence Service. Hearings on *Scope of Soviet Activity in the United States*, Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate

The Subcommittee held public hearings in Washington, D.C., on January 4, 5, and 6, 1956.[1] At the opening of the hearings on January 4, Senator Eastland, the Chairman of the Subcommittee, announced that the hearings about to commence "stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster" (Gov. Ex. 8, p. 1587).[2] Burdett had, the Chairman continued, disclosed the names of persons whom he knew as members of the Communist Party in the early 1940's. The Chairman concluded that the investigation was of great importance because (*ibid.*):

> [A]mong the persons involved in this investigation have been many who were or are members of the press, and * * * the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. * * * The present hearings open up a subsequent chapter to the Burdett testimony * * *.

Following the opening statement, another member of the Subcommittee, Senator Hennings, apparently apprehensive that the public might misconstrue the

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Committee on the Judiciary, 85th Cong., 2d sess., pt. 1, pp. 2, 18–19.

[1] Robert Shelton, the petitioner in No. 9, this Term, and William Price, the petitioner in No. 12, this Term, also refused to answer certain questions at this same hearing and were subsequently convicted for contempt.

[2] Government Exhibit 8 is Part 17 of the Hearings, entitled *Strategy and Tactics of World Communism* (*Communist Activity in New York*).

purpose of the hearings, further explained (Gov. Ex. 8, p. 1588):

> [T]his is not in any sense an attack upon the free press of the United States. * * *
>
> Of course, the committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency. * * * [T]his is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

In response, the Chairman approved Senator Hennings' description of the purpose of the hearings as a "very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety" (*ibid.*). The Chairman went on to say (*ibid.*):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

At petitioner's trial, the counsel for the Subcommittee testified concerning the purpose of the investigation (J.A. 31):

> The purpose of these inquiries was to further the committee's design to learn all it could about the operations of the Communist Party in as many fields as it could go into for

> the purpose of determining what if any legislation would be recommended which would help to preserve and protect the Internal Security and safety and defense of the United States. In these particular hearings we were in an area within the broad area of tactics and strategy, within the narrower area of infiltration of mass communications.

Later, the counsel for the Subcommittee testified that the subject of the investigation was "into mass communications infiltration by Communists" (J.A. 34).

Eighteen witnesses were called by the Subcommittee to testify at the hearings on January 4, 5, and 6, 1956. All had been or were then employed in the communications field. Clayton Knowles, who had previously given the Subcommittee information on Communist activity in newspapers (Gov. Ex. 8, p. 1717), was among the witnesses called to testifiy on January 4. Knowles testified that he was then a reporter for the New York Times; that he was a member from 1937 to 1939 of the Communist Party unit on the Long Island Daily Press where he was a reporter; and that Party members at that time had positions of importance and exerted considerable influence in the American Newspaper Guild (*id.* at pp. 1635–1642).

On January 6, 1956 (two days later), the same day that petitioner testified, the hearings opened with the reading of a telegram sent to the Subcommittee by a New York newspaper, the Long Island Daily Press, in which that newspaper agreed with the Subcommittee's efforts to expose Communist infiltration wherever found (Gov. Ex. 8, p. 1717). The Chairman, in responding to the telegram, repeated that the hearings were directed to investigating Communist infiltration

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into news agencies (*id.* at pp. 1717–1718). Senator Hennings stated (*id.* at p. 1718):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

The Subcommittee then called Robert Shelton, the petitioner in No. 9, this Term, to testify. Immediately after Shelton testified, petitioner was called to testify. Petitioner, a copyreader for the New York Times (Gov. Ex. 8, pp. 1728, 1729), testified that he was a member of the Communist Party from 1935 to approximately 1949, and that he had belonged to Party cells in Bridgeport, Connecticut, where he joined the Party, Buffalo, New York, and New York City (*id.* at pp. 1730–1733, 1739, 1744–1745). When he was asked to name the members of a cell to which he belonged in New York City, however, he declined to answer on the grounds that his private affairs, beliefs, and associations were not proper subjects for investigation; that their pertinence to any valid legislative purpose was in doubt; and that it was doubtful whether Congress had the right to investigate the press (*id.* at pp. 1733, 1735). He disclaimed any reliance on the Fifth Amendment, relying instead on the First Amendment and the doctrine of separation of powers (*id.* at pp. 1733–1735). He subsequently suggested that he would not answer questions which "might cause other individuals unnecessary harm or embarrassment" (*id.* at p. 1737; see also *id.* at pp. 1741, 1742). Petitioner was told by the Chairman that the question was asked because the Subcommittee was investigating

a Communist cell which it had reason to believe was active in New York City and that the Subcommittee wanted to know petitioner's associates in that cell (Gov. Ex. 8, pp. 1737, 1738). Petitioner was then directed to answer the question (*id.* at p. 1739). He again refused (*ibid.*), and this refusal constitutes the basis for count 1 of the indictment (J.A. 4).

On the basis of his original objections to the inquiry, petitioner declined to answer the questions upon which the remaining counts in the indictment are predicated (J.A. 4–6).[4] He refused to state whether the cell to which he belonged in New York City was located at one of the major newspapers, on what newspaper he worked at the time he was a member of the cell, and whether during all or part of the period from January 1943 to June 30, 1951, he was a member of a Communist cell composed of employees of the New York Herald Tribune where he was then employed (counts 3–5) (Gov. Ex. 8, pp. 1740–1741). The Subcommittee counsel then read petitioner a transcript of petitioner's appearance before the Subcommittee in executive session. The transcript showed that petitioner was asked, "while you were with the New York Herald Tribune, were you connected with a Communist unit in the New York Herald Tribune?" (*id.* at p. 1742). After first refusing to answer, petitioner finally gave "[a] very reluctant 'yes'" (*ibid.*). At the public session, petitioner was asked whether this testimony was true, and he said that it was (*id.* at p. 1743). The Subcommittee then asked who were the

[4] The only question to which he gave different grounds for refusal to answer underlies count 8 (see *infra*, p. 12).

members of the cell at the Herald Tribune, and whether any of the members of the cell were currently employed by the Tribune (counts 6 and 7) (Gov. Ex. 8, pp. 1743–1744). Petitioner declined to answer.

Petitioner testified that his first employment in New York in 1938 was with the National Committee for People's Rights (Gov. Ex. 8, pp. 1732, 1743). He was advised by the Subcommittee that in 1942 this organization had been cited by the Attorney General "as a Communist organization, substantially equivalent to the International Labor Defense, legal arm of the Communist Party" (*id.* at p. 1743). After working for this organization for two or three months, he did research on a book, but he refused to give the name of the book or to state for whom he did the research (count 9) (*id.* at pp. 1745–1746). He also refused to state whether the book was published by a Communist publishing house or whether the person for whom he worked was known to him to be a Communist (counts 10 and 11) (*id.* at p. 1746).

Petitioner testified that for a period of eight weeks he was employed by the North American Committee to Aid the Spanish Democracy (Gov. Ex. 8, pp. 1746–1748), but he refused to state whether there were any persons in that organization known by him to be Communists (count 12) (*id.* at p. 1747). He was then advised by the Subcommittee that in 1949 the North American Committee had been cited by the Attorney General as a Communist organization and by the House Committee on Un-American Activities as a Communist front (*ibid.*). He was further informed that it had received funds from the Communist Party of Massachusetts and from the International Workers Order and

that its literature had been sold in Communist bookstores (*ibid.*). Petitioner persisted in his refusal to answer and further declined to name the person who paid him for working for that organization (count 13) (*id.* at p. 1748).

Petitioner testified that he also worked for about two months as a press agent for Films for Democracy (Gov. Ex. 8, pp. 1748–49). He was told by counsel for the Subcommittee that, in March 1944, Films for Democracy had been cited as a Communist-front organization; that the Cinema Bureau in Moscow had laid down directives in 1939 "concerning the building up of audiences for the purpose of agitating against certain films opposed to the current Communist Party line and supporting those which favored the line"; and that, pursuant to that directive, Film Audiences, a Communist front, merged with Films for Democracy to form a new Communist front, Film Audiences for Democracy (*id.* at p. 1749). Petitioner declined to state whether there were any persons connected with Films for Democracy known to him to be Communists or to disclose who paid him for his work (counts 14 and 15) (*id.* at pp. 1748–49).

After he left Films for Democracy, petitioner worked for several months for Veterans of Democracy as a press agent and researcher for one of its officers who was speaking once a week over radio station WQXR (Gov. Ex. 8, pp. 1749–1750). He refused to answer whether any persons connected with that organization were known to him to be Communists or to name the officer for whom he worked (counts 16 and 17) (*id.* at p. 1750).

Petitioner testified that he had worked successively from the fall of 1939 to December 1941 for the Rus-

sian news agency, TASS, for the New York Peace Committee, and for the American Committee for the Protection of the Foreign Born (Gov. Ex. 8, pp. 1751–1752). He was told by the Subcommittee that the American Committee for the Protection of the Foreign Born had been cited by the Attorney General as a subversive and Communist-front organization and that it was known as "one of the oldest auxiliaries of the Communist Party in the United States" (*id.* at pp. 1729, 1752). He declined to state whether any persons in the New York Peace Committee or the American Committee for the Protection of the Foreign Born were known to him to be Communists (counts 18 and 19) (*id.* at p. 1752).

From December 1941 to January 1943, petitioner worked for the Buffalo Evening News (Gov. Ex. 8, pp. 1728, 1753). He testified that he joined a Communist unit in Buffalo, but he refused to state who were the members of that unit (count 2) (*id.* at pp. 1739, 1753). In January 1943, he returned to New York where he became a copy reader for the New York Herald Tribune (*id.* at p. 1753). He remained with the Tribune until the end of June 1951, when he began his present employment with the New York Times (*id.* at p. 1754).

Petitioner testified that he left the Communist Party in 1948 (Gov. Ex. 8, pp. 1730–1731, 1745). He could not recall writing a formal resignation but at about that time he stopped going to meetings and paying dues (*id.* at p. 1745). "[O]n the basis of privileged communication between me and my wife," he declined to state whether he told anyone that he was quitting the Party (count 8) (*ibid.*).

SUMMARY OF ARGUMENT

I

The hearings at which petitioner appeared were properly authorized. As we have shown in our brief in *Liveright* v. *United States*, No. 11, this Term, pp. 19–28, the Senate authorized the Judiciary Committee or one of its subcommittees to investigate Communist activities. S. Res. 366, 81st Cong., 2d Sess.; S. Res. 58, 84th Cong., 1st Sess. The record at the trial clearly showed that the Judiciary Committee in 1955 authorized the continuance of the Internal Security Subcommittee, established under Senate Resolution 366, during the 84th Congress. Moreover, petitioner cannot claim that the Judiciary Committee had not delegated its authority to the Subcommittee since he did not raise this issue when he appeared before the Subcommittee (see our briefs in *Shelton* v. *United States*, No. 9, this Term, pp. 25–29, and *Liveright*, pp. 29–32) nor in his petition for a writ of certiorari in this Court.

Similarly, petitioner cannot contend that the Subcommittee failed to authorize, as required by its own rules, the particular hearings at which petitioner appeared because he did not raise this issue before the Subcommittee or at trial. If the issue had been raised at the trial, the government could have presented evidence directly on this issue. See *Giordenello* v. *United States*, 357 U.S. 480, 487–488. In any event, since a majority of the Subcommittee's members were present at the start of the hearings, and none objected, they implicitly approved the investigation. And, even

if they had not done so, the Subcommittee counsel testified at petitioner's trial that the Subcommittee did not consider the hearings as the start of a major investigation and therefore under the Subcommittee's rules no new approval was required.

II

For the same reasons stated in our brief in *Shelton* v. *United States, supra*, pp. 48–50, which involved the same investigation and hearings, the Subcommittee's investigation did not violate the First Amendment. See *Barenblatt* v. *United States*, 360 U.S. 109, 125–134.

Petitioner attempts to distinguish *Barenblatt* on the ground that the questions he refused to answer sought the identity of other persons. In fact, however, only seven of the questions were of this type. In any event, this contention is without merit.

A. Petitioner has no standing to claim the First Amendment rights of other persons. He admitted that he was a member of the Communist Party. The questions which he refused to answer involved the identity of others.

This Court has held in numerous cases that a litigant cannot invoke the constitutional rights of others. The only exception is when the litigant can be said to represent the persons whose constitutional rights were allegedly violated. Thus, an association can invoke the rights of its members. See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449. In contrast, here petitioner's only connection with the unnamed other persons is at most friendship and common membership, in the past, in the Communist Party.

B. Even if petitioner had standing to raise this issue, the First Amendment is not violated by questions asking the identity of other persons. In *Barenblatt*, the Court held that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended" (360 U.S. at 134). The governmental interest in questions disclosing the identity of other persons involved in Communist activities is at least as strong as its interest in the questions involved in *Barenblatt* concerning the Communist activities of the witness himself. Moreover, a witness' individual interest in asserting the First Amendment rights of others, if he has standing to assert these rights at all, is substantially less than the interest the witness has in claiming his own rights. At the most, petitioner, in claiming the rights of others, stood in the same position as if those persons were claiming their rights for themselves—that is, the same position as Barenblatt was in.

In addition, the issue as to three of the counts, involving questions seeking the identity of persons in the Communist Party cell, is substantially controlled by *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1. There the Court upheld the constitutionality of an order requiring the registration of all Party members. *A fortiori*, then, a Congressional committee, seeking information in order to legislate, can require a witness to disclose the names of members of Party units to which he belonged.

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III

Petitioner cannot excuse his refusal to answer by the alleged lack of pertinency of the questions.

A. Petitioner made no objection before the Subcommittee to the pertinency of the questions. While he did claim that the questions could not be pertinent to any valid legislative purpose because of the prohibitions of the First Amendment, this is not a claim that the questions were not pertinent to the subject actually under inquiry. Therefore, as we have shown in our brief in *Shelton, supra,* pp. 25–29, petitioner cannot claim that the Subcommittee failed to apprise him of the subject under inquiry or the pertinency of the questions to that subject.

Moreover, petitioner was clearly apprised by the Subcommittee of the subject under inquiry: Communist activities in news media. The pertinency to this subject of seven of the questions which petitioner refused to answer and on which he was convicted was made clear either by the questions on their face or by the explanation of the Subcommittee.

B. The government proved, as 2 U.S.C. 192 requires, that the questions petitioner refused to answer were pertinent to the subjects under inquiry. By introducing the transcript of the hearings, the government established the subject under inquiry described above. As we have noted, the pertinency of seven of the questions was made clear to petitioner by the Subcommittee. The government showed, through oral testimony, that the other two questions were also pertinent.

Petitioner contends that the Subcommittee counsel testified and the Assistant United States Attorney stated at the trial that the subject under inquiry was Communist activities generally. This subject, however, is perfectly consistent with the subject of Communist activities in news media; the latter is merely a portion of the broader subject. Moreover, if the subject was Communist activities generally, this is a proper subject within the authority of the Subcommittee (see our brief in *Liveright, supra,* pp. 42–44). All the questions were pertinent, either on their face or as shown by the government's evidence at the trial, to this subject.

IV

Petitioner contends that the Subcommittee failed to apprise him of the source of its authority from the Senate. Petitioner, however, did not even suggest this objection when he appeared before the Subcommittee when the Subcommittee could readily have met the objection. Therefore, he cannot raise it at his trial for contempt. In any event, there is no need for a Congressional committee to apprise a witness of the source of its authority since the authority of the committee, unlike the subject under inquiry, is contained in the authorizing resolutions which are public documents.

V

Petitioner contends that the indictment was required to specify the subject under inquiry and the pertinency of the questions to those subjects, and to state the delegation of authority from the parent Committee to the Subcommittee. As shown in our brief in *Shelton, supra,* pp. 78–83, under Rule 7(c) of

the Federal Rules of Criminal Procedure and the decisions of this Court and the courts of appeals, an indictment need not specify the subject under inquiry. For the same reasons, it need not provide the reasoning underlying the allegation that the questions were pertinent. We show in our brief in *Price* v. *United States*, No. 12, this Term, p. 34, that the indictment properly alleged the authority of the Subcommittee.

ARGUMENT

Petitioner was convicted of refusing to answer nineteen questions asked him by a Congressional committee. Four of these questions directly involved his own activities in the Communist Party—whether the Party cell to which he belonged was in one of the major newspapers in New York City (count 3); what was the name of the newspaper (count 4); whether he was a member of a Party cell on the New York Herald Tribune (count 5); and whether the book he researched was published by a Communist publishing house (count 10). We agree, however, with petitioner (Pet. Br. 39) that petitioner answered the questions involved in counts 3, 4, and 5 (Gov. Ex. 8, pp. 1742–1743) and therefore his conviction on these counts was improper.[4] Eight questions concerned the

[4] Petitioner first refused to answer, even after being directed to do so. Subsequently, however, he was confronted with the transcript of his appearance before the Subcommittee in executive session where he answered these questions and he then admitted that this answer was true (see *supra*, pp. 9–10). Petitioner did not claim that he had answered these three questions in the district court, the court of appeals, or in his petition for a writ of certiorari. Apparently, this fact was overlooked by him, the government, the Subcommittee, the Senate, and the courts below.

Party activities of other persons, but did not ask the disclosure of their names—whether the members of the Party cell on the Herald Tribune were still employed by that newspaper (count 7); whether he told anyone when he quit the Party (count 8); whether the person for whom he had done the research work was a Communist (count 11); and whether there were any Communists in the North American Committee to Aid the Spanish Democracy (count 12), Films for Democracy (count 14), Veterans for Democracy (count 16), the New York Peace Committee (count 18), and the American Committee for the Protection of the Foreign Born (count 19). Only seven questions required the disclosure of the identity of other persons—who were the members in the Party cell in New York City to which petitioner admitted he belonged (count 1); who were the members of a Party cell in Buffalo to which petitioner admitted he had belonged (count 2); who were the members of the Party cell in the Herald Tribune,*

* In our Brief in Opposition, p. 15, note 9, we suggested that this question may, in view of petitioner's testimony, duplicate the question involved in count 1. This suggestion, however, seems erroneous. Petitioner testified that he was in a Party cell in Bridgeport, Connecticut, from 1935 to 1937, and that he then came to New York City where he joined a Party cell (Gov. Ex. 8, p. 1732). After being asked what unit he first belonged to in New York, he was asked the question involved in count 1—who were the members of that cell (*id.* at pp. 1733, 1737). Petitioner subsequently testified that he left New York City and joined a Party cell in Buffalo and that he had belonged to more than one cell in New York City (*id.* at p. 1739). Petitioner admitted that he had been a member of a Party cell on the Herald Tribune while working there and that he worked for the Tribune from 1943 to 1951 (*id.* at pp. 1741–1743). He then refused to

to which petitioner admitted he belonged (count 6); what was the name of the book which petitioner researched and who was the person for whom he had done the work (count 9); who had paid petitioner when he worked for the North American Committee to Aid Spanish Democracy (count 13); who paid him when he worked for Films for Democracy (count 15); and who was the officer of Veterans for Democracy who spoke over WQXR (count 17). Petitioner was given a general sentence and a fine on all nineteen counts (J.A. 62–63), which was less than the maximum authorized by 2 U.S.C. 192 under any one count; therefore the judgment below must be affirmed if any one of the counts is valid. *E.g., Barenblatt* v. *United States,* 360 U.S. 109, 115.

I

THE HEARINGS AT WHICH PETITIONER APPEARED WERE PROPERLY AUTHORIZED

Petitioner contends (Pet. Br. 46–50) that the hearings at which he appeared were not properly authorized because (1) Senate Resolution 366, 81st Congress, which is the authorizing resolution of the Subcommittee, is ambiguous; (2) the resolution authorizes "the Committee on the Judiciary, or any duly authorized subcommittee thereof" to investigate Communist activities and the record does not show that

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disclose the members of that cell (count 6) (*id.* at p. 1743). Thus, it appears that petitioner's answer to the question involved in count 1 would have disclosed the members of the cell to which he belonged when he first arrived in New York City in 1938, while his answer to the question involved in count 6 would have disclosed the members of the cell on the Herald Tribune to which he belonged after 1943.

the Judiciary Committee had so authorized its Internal Security Subcommittee; and (3) a majority of the Subcommittee never approved these particular hearings, as required by the Subcommittee's rules. We submit that these contentions are without merit.

A. THE RESOLUTIONS ESTABLISHING AND CONTINUING THE SENATE SUBCOMMITTEE ON INTERNAL SECURITY AUTHORIZED A SUBCOMMITTEE OF THE JUDICIARY COMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES IN THE UNITED STATES

We have shown in our brief in *Liveright* v. *United States*, No. 11, this Term, pp. 19–28, that the Senate authorized the Judiciary Committee or one of its subcommittees to investigate Communist activities. S. Res. 366, 81st Cong., 2d Sess.; S. Res. 58, 84th Cong., 1st Sess. Therefore, the Judiciary Committee was authorized to establish a subcommittee which could question petitioner concerning the subject under inquiry when he testified—*i.e.*, Communist infiltration of news media (see *infra*, pp. 40–41, 43–46).

B. THE JUDICIARY COMMITTEE AUTHORIZED THE INTERNAL SECURITY SUBCOMMITTEE

Petitioner cannot claim that the Subcommittee was not authorized by the Judiciary Committee since he failed to raise this contention before the Subcommittee. As explained in our briefs in *Shelton* v. *United States*, No. 9, this Term, pp. 25–29 and *Liveright*, pp. 29–32, a witness before a Congressional committee cannot raise at his trial procedural issues on which he did not rely at the time he refused to answer the questions. See *United States* v. *Bryan*, 339 U.S. 323, 330–335; *Emspak* v. *United States*, 203 F. 2d 26, 54, 56 (C.A. D.C.), reversed on other grounds, 349 U.S. 190. The issue whether the Judiciary Committee properly dele-

gated the powers conferred on it by the Senate involves the internal procedures of the Judiciary Committee. Just like the defects said to be involved in *Liveright* v. *United States, supra*—whether the Subcommittee could sit while the Senate was in session and whether the Judiciary Committee had authorized an executive session—the defect alleged here could easily have been remedied (assuming petitioner's contention were correct that the Judiciary Committee had not already authorized the Subcommittee) by having the Judiciary Committee vote an authorizing resolution.

Petitioner is also precluded from raising this issue because it was not presented in his petition for a writ of certiorari. Therefore, under Rule 40(1)(d)(2) of the Rules of this Court, he cannot raise it in his brief on the merits unless there was "plain error." *E.g.*, *Kessler* v. *Strecker*, 307 U.S. 22, 34.

In any event, petitioner's contention is clearly without substance. Government Exhibit 3, an excerpt from the official minutes of a meeting of the Judiciary Committee on January 20, 1955, states that the Committee adopted the following resolution:

> Resolved, by the Committee on the Judiciary, that the Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws under S. Res. 366 (81st Cong.) be continued as a Special Subcommittee of the Committe on the Judiciary during the 84th Congress and that the Committee report an appropriate original resolution favorably to the Senate for this purpose.

The minutes of another meeting of the Judiciary Committee on February 7, 1955, show that the Chairman

appointed nine members of that Committee to the Subcommittee (Gov. Ex. 4). And on March 18, 1955, the Senate passed Senate Resolution 58, 84th Cong., 1st Sess., authorizing the continuance of the Subcommittee. While the resolution of the Judiciary Committee to continue the Subcommittee preceded the Senate's authorizing resolution, it is plain that the Judiciary Committee authorized the Subcommittee to act during the 84th Congress.

C. THE INTERNAL SECURITY SUBCOMMITTEE AUTHORIZED THIS PARTICULAR HEARING

Petitioner cannot claim that the government did not prove that the Subcommittee had voted to authorize this particular hearing. First, petitioner did not raise this issue before the Subcommittee. Since it is an issue involving the internal procedures of the Subcommittee, it cannot be raised at petitioner's trial for the first time. If petitioner had raised it before the Subcommittee, it could easily have been remedied by having the Subcommittee authorize the hearing. Second, petitioner cannot raise the issue in this Court since he did not raise it in the district court or in the court of appeals. It is well established that this Court will not notice errors which have not been raised below unless they are obvious. *E.g., United States* v. *Atkinson,* 297 U.S. 157, 159–160; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 239; *Johnson* v. *United States,* 318 U.S. 189, 200. Moreover, this Court has held that an issue involving questions of fact cannot be raised for the first time on appeal since such a procedure deprives the other party of the opportunity to introduce evidence on the issue. *United States* v. *Di Re,* 332 U.S. 581, 588;

Giordenello v. *United States*, 357 U.S. 480, 487–488. This principle is applicable here since the government is entitled to have the opportunity to introduce evidence directly on this issue.

In any event, we submit that the record shows that the Subcommittee authorized the hearings. Under Rule 1 of the Subcommittee's rules, a major investigation must be voted by a majority of the Subcommittee's members. Since seven of the nine members were present at the start of this hearing (Gov. Ex. 8, p. 1587), and none objected to it, they implicitly considered the investigation as approved. While petitioner states (Pet. Br. 48 and 49, note 26) that Senator Hennings said that the hearing was not authorized, and cites the Hearings, Part 17, p. 1588, the reference does not support his contention. The transcript of the hearing shows that Senator Hennings was concerned with an entirely different problem—whether the Subcommittee was investigating Communist infiltration of the press or the press itself. Senator Hennings claimed that the latter was the correct purpose of the investigation, and the Chairman agreed (see *supra*, pp. 5–6).

In addition, the Subcommittee counsel testified at petitioner's trial that the Subcommittee did not consider that it was initiating a major investigation (J.A. 37; Tr. 183–184), which, under its rules, would require approval of the Subcommittee. He explained that the basic investigation, which had been initiated long before, was into "the strategy and tactics of world Communism" and this investigation into Communist activities in news media was merely "an offshoot and a portion" (J.A. 37). Thus, under the Subcom-

mittee's own interpretation of its rules—which, unless clearly inconsistent with the language of the rules, is conclusive—no new approval of these hearings was necessary.

II

THE SUBCOMMITTEE'S INVESTIGATION DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner and the *Amicus Curiae* (the New York Civil Liberties Union) claim (Pet. Br. 52–58; *Amicus* Br. 14–21) that the Subcommittee's investigation violated his rights under the First Amendment. As we have demonstrated, however, in our brief in *Shelton* v. *United States*, No. 9, this Term, pp. 48–50, which involved the same investigation and hearings, petitioner's contention is without merit. See also *Barenblatt* v. *United States*, *supra*, 360 U.S. at 125–134.

Petitioner attempts (Pet. Br. 53, 54) to distinguish *Barenblatt* on the ground that he and his associates engaged in "lawful political activity, entirely unconnected with overthrow of the government." Even if we assume this is true—and petitioner's refusal to answer may well have foreclosed questions which would have shown the contrary[1]—the Subcommittee was clearly entitled to ask the questions and require petitioner to answer. This Court, in *Barenblatt*, rejected a similar claim on the ground that there is a "close nexus between the Communist Party and vio-

[1] Petitioner offered to prove at his trial that he himself had not engaged in illegal activities (J.A. 46–48), but he could not possibly know of all the activities of his associates.

lent overthrow of government" and therefore upheld an investigation "into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow" (360 U.S. at 128–129). The Court held that a Congressional committee could properly "inquire into the various manifestations of the Party's tenets. The strict requirements of a prosecution under the Smith Act * * * are not the measure of the permissible scope of a congressional investigation into 'overthrow', for of necessity the investigatory process must proceed step by step." 360 U.S. at 130. Similarly, in *Wilkinson* v. *United States*, 365 U.S. 399, 414, the Court said:

> [W]e cannot say that, simply because the petitioner at the moment may have been engaged in lawful conduct, his Communist activities in connection therewith could not be investigated. * * * As the *Barenblatt* opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's overbalancing interest. * * *
>
> The subcommittee's legitimate legislative interest was not the activity in which the petitioner might have happened at the time to be engaged, but in the manipulation and infiltration of activities and organizations by persons advocating overthrow of the Government.

And in *Braden* v. *United States*, 365 U.S. 431, 435, the Court again stated:

> *Barenblatt* did not confine congressional committee investigation to overt criminal activity * * *. Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts in [the South] was surely not constitutionally beyond the reach of the subcommittee's inquiry.

Petitioner also attempts to distinguish *Barenblatt* on the ground that petitioner "discussed fully his own membership in the Communist Party and refused only to give information which would reveal the identity of his associates" (Pet. Br. 53; see the *Amicus* Br. 14–21). He reasons that the public interest underlying the Subcommittee's questions—the legislative value of the identity of petitioner's associates—was never shown and that petitioner's private interest—the non-disclosure of his associates—is the most compelling possible private interest. Thus, he concludes that "balancing * * * the competing private and public interests at stake in the particular circumstances" of this case (*Barenblatt, supra,* 360 U.S. at 126), results, unlike in *Barenblatt,* in giving the witness immunity from answering the Subcommittee's questions.

We submit that this contention, even if it were correct, is not sufficient to reverse petitioner's conviction. As we have indicated above (pp. 18–19), one of the questions petitioner refused to answer related directly to his own Party activities—whether the book for which he did research was published by a Communist publishing house (count 10)—and eight others, while relating to the activities of other persons, did not require

the disclosure of their identity. In any event, as we will now show, petitioner's contention with regard to the seven questions which sought the names of other persons is without merit.

A. PETITIONER CANNOT RAISE THE FIRST AMENDMENT RIGHTS OF OTHER PERSONS

Petitioner admitted that he was a member of the Communist Party, but refused to answer, *inter alia*, questions concerning the identity of others. These questions did not interfere with his own rights of speech and association as protected by the First Amendment since any interference with those rights[4] had already occurred when he testified as to his own activities. While conceivably he might be reluctant to associate with others if he knew that he would have to divulge their names to a Congressional committee, the reason for this reluctance was his own moral scruple against testifying about other persons. But "moral scruples," if not based on some valid legal ground, are not legal justification for refusing to answer. Insofar as inquiry by the Subcommittee might inhibit petitioner's own speech or association, it is entirely as a result of petitioner's moral beliefs which are not protected by the First Amendment. Insofar as the questions asked petitioner might involve rights which are protected by the First Amendment, they would be the rights of association and speech of other persons who conceivably might be inhibited by the knowledge that their identity could

[4] We do not concede that there was any invalid interference with such rights (see *supra*, pp. 25-27).

be revealed by colleagues to an investigating committee.

It is well settled that, in the absence of exceptional circumstances, a litigant can raise only his own constitutional rights. For example, a defendant cannot complain of an illegal search and seizure under the Fourth Amendment unless he himself was injured by it. *Jones* v. *United States,* 362 U.S. 257, 260–267.* Similarly, the Fifth Amendment privilege against self-incrimination is exclusively personal. See *Hale* v. *Henkel,* 201 U.S. 43; *Rogers* v. *United States,* 340 U.S. 367. In *Tileston* v. *Ullman,* 318 U.S. 44, the Court unanimously dismissed an appeal by a physician from a decision of a state court upholding the constitutionality of a statute prohibiting the use of drugs or instruments to prevent conception and the giving of assistance in their use (*id.* at 46):

> We are of the opinion that the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. *Cronin*

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* *Jones* held that a person legitimately on the premises at the time of the allegedly illegal search and seizure is sufficiently injured to claim the Fourth Amendment even though he was only a "guest" or "invitee."

v. *Adams*, 192 U.S. 108, 114; *Standard Stock Food Co.* v. *Wright*, 225 U.S. 540; *Bosley* v. *McLaughlin*, 236 U.S. 385, 395; *Blair* v. *United States*, 250 U.S. 273; *The Winnebago*, 205 U.S. 354, 360; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U.S. 207, 220.

The only significant exception to the rule that a litigant can raise only his own constitutional rights against allegedly invalid governmental action is when the litigant can properly be said to represent the persons whose constitutional rights were allegedly violated, and, in addition, the litigant himself was seriously injured. In *Pierce* v. *Society of Sisters*, 268 U.S. 510, the state had passed a law requiring parents to send their children to public schools. The Court allowed two corporations to invoke the Fourteenth Amendment rights of patrons of their schools in order to protect their own business and property from destruction by unconstitutional governmental action taken against their patrons. *Id.* at 535. In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, the Court considered a claim that plaintiff organizations were deprived of due process by the action of the Attorney General in labelling them as "Communist" without notice or hearing. The resulting lists were turned over to the Loyalty Review Board for use in connection with determinations of disloyalty of government employees. In these circumstances, two concurring opinions indicated that an organization could raise the constitutional rights of its members. Mr. Justice Frankfurter stated (*id.* at 159):

> The threat which it carries for those members who are, or propose to become, federal employees makes it not a finicky or tenuous claim to object to the interference with their opportunities to retain or secure such employment as members. The membership relation is as substantial as that protected in *Truax* v. *Raich* [10] and *Pierce* v. *Society of Sisters* * * *.

And Mr. Justice Jackson similarly stated (*id.* at 187):

> [T]he Government has lumped all the members' interests in the organization so that condemnation of the one will reach all. The Government proceeds on the basis that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other. Having adopted this procedure in the Executive Department, I think the Government can hardly ask the Judicial Department to deny the standing of the organizations to vindicate its members' rights.

In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 458–460, the Court adopted the reasoning of the two concurring

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[10] In *Truax* v. *Raich*, 239 U.S. 33, a state statute prohibited businesses from employing more than twenty percent aliens. The Court upheld the right of an alien-employee to enjoin officers of the state from enforcing the statute even though the statute penalized only employers. The issue was of the kind, not involved in the instant case, as to whether the litigant was sufficiently affected by the statute to challenge it, and the Court held that the alien was directly affected. There was no question whether the alien could raise the constitutional rights of another person since the right to work and earn a livelihood, which was the constitutional right invoked, was the alien's own right, not the employer's.

opinions in *Joint Anti-Fascist* in holding unconstitutional the state's attempt to compel the Association to disclose its membership list. The Court repeated its settled rule embodied in *Tileston* v. *Ullman, supra,* and then held that this rule was not violated by allowing an association to assert the constitutional rights of its own members to freedom of association (357 U.S. at 459–460):

> Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association * * * is but the medium through which its individual members seek to make more effective the expression of their own views. The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing toward our holding that petitioner has standing to complain of the production order on behalf of its members. Cf. *Pierce* v. *Society of Sisters,* * * *.

Similarly, in *Bates* v. *Little Rock,* 361 U.S. 516, the Court allowed officials of the N.A.A.C.P. to assert the constitutional rights of its members in upholding the claim that compulsory disclosure of the N.A.A.C.P.'s membership lists would violate their freedom of association. In *Uphaus* v. *Wyman,* 360 U.S. 72, the Court was faced with the analogous problem whether the director of a summer camp could assert the constitutional rights of his guests in refusing to comply with a state order to produce the names of the guests. The Court, however, refused to decide this

issue (*id.* at 77–78) and held that Uphaus' claims, assuming he had standing to raise them, were invalid on their merits.

We submit that petitioner's assertion of the rights of the unknown other persons goes far beyond the circumstances of *Pierce*, *Joint Anti-Fascist*, *N.A.A.C.P.*, *Bates*, and *Uphaus*. In *Joint Anti-Fascist* and *N.A.A.C.P.*, organizations were asserting the rights of their own members on matters of common concern. In *Bates*, officers of the organization asserted the rights of the organization's members on matters of common concern. In *Pierce*, while the individuals whose rights were claimed did not actually belong to the organizations which brought the action, nevertheless the organizations and the individuals (schools and their patrons) were integrally related, especially with regard to the impact of the particular statute and constitutional right involved in the case. Moreover, the organizations were threatened with direct and severe harm, indeed destruction, if the statute were enforced. Similarly, in *Uphaus*, while the individuals involved were, strictly speaking, guests and not members of an organization, they too were integrally related to the organization. And Uphaus, as the executive director of the organization, was asserting the right of the organization to represent its guests in a matter of common concern. In contrast, in the instant case, petitioner is, of course, not an organization to which the third persons belonged, or of which they were guests or patrons; nor is he an officer who can claim to represent such an organization. Petitioner's only connection with the unnamed third

persons is at most one of friendship and common membership, in the recent past, in the Communist Party. This is not a sufficiently close relationship to allow him to raise and vindicate their rights. If it were held to be adequate, deep inroads would be made in the settled principle that a litigant is limited to the prosecution of his own rights.

B. THE FIRST AMENDMENT IS NOT VIOLATED BY QUESTIONS ASKING THE IDENTITY OF OTHER PERSONS

Even if the Court were to consider the First Amendment rights of other persons, the Court should hold that such rights were not violated.

When it subpoenaed and sought to question petitioner, the Subcommittee had under inquiry the subject of Communist activities in news media (see *infra*, pp. 40–41, 43–46). Any question whether Congress has the power to investigate Communist activity in this field has been determined by this Court's holding in *Barenblatt* v. *United States*, *supra*. There, the Court first stated generally that "Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof" (360 U.S. at 127), and that "[j]ustification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence" (*id.* at 128). The Court concluded that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended" (360 U.S. at 134).

The government interest at stake in inquiring about other persons involved in Communist activities is at least as strong as those in *Barenblatt* concerning the Communist activities of the witness himself. It is just as important to a Congressional committee to ascertain the Communist activities of other persons as of the witness. Indeed, it may be more valuable since the committee is required to have some information concerning the witness in order to subpoena him. The Court has indicated that a Congressional committee can subpoena a witness only if it has probable cause to believe that he has some information of use to it (see our brief in *Shelton, supra,* pp. 50–55). In contrast, the committee presumably does not know the identity of the other persons. And if it determines their identity, the committee can question them in order to determine their own Communist activities and knowledge of Communist activities generally.

On the other hand, the individual interests here are, at best, no greater than in *Barenblatt,* and are probably weaker. If petitioner has standing to assert the First Amendment rights of other persons (but see *supra,* pp. 28–34), his individual interest in this assertion is substantially less than the interest Barenblatt had in claiming his own First Amendment rights.

Petitioner has chosen to protect what he believes to be the First Amendment rights of other persons who have apparently no more intimate connection with himself than friendship. Barenblatt, in contrast, had the direct interest of protecting his own privacy of belief, association, and activity. Thus insofar as petitioner is concerned, there is even more reason in the circumstances of this case than in *Barenblatt* to strike

the balance in favor of the governmental, rather than individual, interest. And insofar as the case is viewed from the standpoint of the other persons, their interest in preventing disclosure through third parties (such as petitioner) of their beliefs and activities is less than their interest in not being compelled themselves to testify as to those matters. But *Barenblatt* holds that if these other persons were themselves called before the Subcommittee, they would have to answer such questions as to their own conduct. At the very most, petitioner, in claiming the rights of these others, stands in the same position as if they were claiming their rights for themselves—that is, the same position as Barenblatt was in. Therefore, this Court's decision in *Barenblatt* is, we believe, inescapably controlling.

Moreover, the issue as to three of the counts is substantially controlled by *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1. There, this Court held constitutional a provision of the Internal Security Act of 1950 requiring the registration and filing of membership lists by organizations claimed to be substantially controlled by the foreign powers controlling the world Communist movement, and which operate primarily to advance the objectives of that movement: the overthrow of existing government by any means necessary and the establishment in its place of a Communist totalitarian dictatorship. The Court found that the danger to the national security from such organizations justified the Congress in requiring disclosure of their members, unlike the situation in *N.A.A.C.P.* v. *Alabama, supra*, *Bates* v. *Little Rock, supra*, and *Shelton* v. *Tucker*, 364 U.S. 479,

where, the Court said, the state had shown no substantial interest in the disclosure of the organization's members (367 U.S. 88–105). The Court further held that the evidence before the Subversive Activities Control Board sustained the Board's determination that the Communist Party was required to register under the Act (*id.* at 69).

This Court has indicated that the power of Congress to investigate is broader than the area within which it can constitutionally legislate. *Barenblatt* v. *United States, supra,* 360 U.S. at 130; *Wilkinson* v. *United States,* 365, U.S. 399, 414–415. The questions involved in counts 1, 2, and 6—who were the members of a Communist Party cell in New York City, of a Party cell in Buffalo, and of a Party cell on the New York Herald Tribune, to which cells petitioner admitted he belonged—are obviously far less broad than the requirement of the Internal Security Act that all Party members must register. Since Congress can, consistent with the First Amendment, pass legislation requiring the registration of all Party members, *a fortiori,* then, a Congressional committee, seeking information in order to legislate, can require a witness to disclose the names of members of Party units to which he belonged.

III

THE QUESTIONS PETITIONER REFUSED TO ANSWER WERE PERTINENT TO THE SUBJECT UNDER INQUIRY AND THIS PERTINENCY WAS MADE CLEAR TO PETITIONER BY THE SUBCOMMITTEE

Petitioner contends that the government failed to prove the subject under inquiry by the Subcommittee

or the pertinency of the subject to the subject under inquiry (Pet. Br. 20–42) and that the Subcommittee failed to apprise him of this pertinency when he appeared before it (Pet. Br. 42–46). Both contentions are without merit.

A. PETITIONER FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS WHEN HE APPEARED BEFORE THE SUBCOMMITTEE AND THEREFORE CANNOT CLAIM AT HIS TRIAL THAT HE WAS NOT APPRISED OF THEIR PERTINENCY. IN ANY EVENT, HE WAS APPRISED OF THEIR PERTINENCY

1. As we have shown in our brief in *Shelton* v. *United States, supra,* pp. 25–32, a witness before a Congressional committee cannot claim that the committee has failed to apprise him of the subject under inquiry and the pertinency of the questions to this subject, unless he raises the issue of pertinency before the committee itself. *Barenblatt* v. *United States, supra,* 360 U.S. at 123–124; *Deutch* v. *United States,* 367 U.S. 456, 469. He cannot wait until trial to raise an objection which the committee could easily remedy.

Before the Subcommittee, petitioner failed to object to the questions on the ground of pertinency. Except for stating that he did not want to inform on others, petitioner relied entirely on various objections based on the First Amendment (see *supra,* pp. 8–9). The only possible objection based on pertinency in his written statement, which was undoubtedly prepared with the aid of counsel, was (*id.* at p. 1733):

> I respectfully submit that my private affairs, beliefs, and associations are not proper subjects for investigation by this subcommittee. Their pertinence to any valid legislative in-

> quiry is in serious doubt since the first amendment to the constitution prohibits legislation affecting freedom of speech and assembly.

Similarly, petitioner, who was accompanied by counsel (Hearings, Part 17, p. 1728), orally stated at the hearing the substance of this part of his written statement as: "[M]y private affairs, my beliefs, my associations, are not I believe, proper subjects for investigation by this subcommittee and that their pertinence to any valid legislative purpose is in doubt" (*id.* at p. 1735). These objections plainly were that the investigation could not be pertinent to any legislative purpose valid under the First Amendment. They do not mean that the questions were not pertinent to the subject in fact under inquiry. Moreover, even if petitioner meant to object to the pertinency of the questions to the subject under inquiry, he did not say that he was refusing to answer because he believed the questions were not pertinent. Instead, he said merely that their pertinence was in doubt.

Even if petitioner's objection was intended to question the pertinency of the questions to the subject under inquiry, this Court held in *Barenblatt* that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *" (360 U.S. at 124). Similarly in *Deutch*, the Court held that the issue of pertinency was not raised by indications of "doubt as to the importance of the questions, [since] the petitioner's main concern was clearly his own conscientious unwillingness to act as an informer" (367 U.S.

at 469). These statements apply equally here. The written and oral statements of petitioner's objections were made prior to any of the questions which were the subject of the indictment and when petitioner subsequently refused to answer he merely referred to his earlier statement. Petitioner's objection expresses at most only doubt as to pertinency. And petitioner's unwillingness to answer was clearly based on his claim that the Subcommittee lacked the constitutional power to conduct this investigation and on his desire to avoid being an informer.

2. In any event, petitioner was apprised of the subject under inquiry. Petitioner admits (Pet. Br. 43) that he was present at the start of the hearing on January 6, 1956, a few minutes before he testified (he was the second witness on that day). At that time the Chairman of the Subcommittee stated that the hearings were directed to investigating infiltration of persons identified as Communists into news agencies (Gov. Ex. 8, pp. 1717–1718). Senator Hennings said (*id.* at p. 1718):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate *newspapers or other media of communication*. [Emphasis added.]

And petitioner's prepared statement, on which he relied at the hearings as stating his reason for refusing to answer the questions underlying his conviction, demonstrates clearly that he knew that the Subcommittee's investigation was into Communist activities

in news media. The statement is largely devoted to the claim that the Subcommittee's investigation of the newspaper field violated the freedom of the press guaranteed by the First Amendment (*id.* at pp. 1733–1734). On the basis of similar objections, this Court held in *Barenblatt* that "[i]n light of [the witness'] proposed memorandum of constitutional objections there can be no doubt that this petitioner was well aware of the Subcommittee's authority and purpose to question him as it did" (360 U.S. at 124).

Of the questions petitioner refused to answer, at least four were pertinent on their face to the subject of Communist activities in news media: who were the members of the cell on the Herald Tribune (count 6); whether any members of that cell were still employed by the Herald Tribune (count 7); whether a book on which petitioner had admittedly done research was published by a Communist publishing house (count 10);[11] and whether the person for whom

[11] Petitioner contends (Pet. Br. 39) that count 10 is invalid because the question on which it is based was vague. Petitioner, however, did not object on this basis before the Subcommittee and therefore cannot raise the issue now (see our brief in *Shelton*, *supra*, pp. 25–29). If petitioner had claimed before the Subcommittee that he did not understand the question, the Subcommittee could easily have made it more clear.

In any event, we believe that the question was sufficiently clear for a Congressional committee to require a witness to answer. It was asked following a series of questions relating to Communist Party cells and to the National Committee for Peoples' Rights, which the Subcommittee told petitioner had been cited by the Attorney General as the equivalent of the "legal arm of the Communist Party" (Gov. Ex. 8, p. 1743). In this context, the phrase "Communist publishing house" surely meant, not merely a publisher of Communist writings, but one which was controlled and run by Party members.

petitioner had done the research was known to petitioner to be a Communist (count 11).

In addition, petitioner refused to answer whether any persons connected with Veterans of Democracy were known by him to be Communist or to name the officer of that organization for whom he had worked (counts 16 and 17) (see *supra*, pp. 11-12). Petitioner had previously admitted working for that organization, in part as a researcher for one of its officers who spoke weekly over a radio station. Thus, the pertinence of these questions to Communist activities in mass media was likewise clear.

The question involved in count 8—whether petitioner told anyone when he quit the Communist Party—was likewise plainly pertinent. The question whether a witness is a member of the Communist Party is on its face, as the Court held in *Barenblatt*, 360 U.S. at 125, pertinent to an investigation of any aspect of Communist activities. Here, after petitioner testified that he left the Communist Party in 1948 (Gov. Ex. 8, p. 1744), he was asked what he did to evidence his withdrawal (*id.* at p. 1745). He answered that he stopped going to meetings and paying dues. The Subcommittee asked whether petitioner had written a resignation or told anyone, and he answered that he had not written a resignation. Petitioner was then asked whether he had told anyone and he invoked the husband-wife privilege.[11] The

[11] Petitioner contends (Pet. Br. 40) that the Subcommittee was required to accept this objection. Petitioner's claim of privilege was improper, however, since the Subcommittee's question did not seek to elicit the substance of petitioner's com-

Subcommittee directed him to answer and he refused. Clearly, this series of questions was, as the district court held (J.A. 37–38), an attempt to ascertain whether petitioner had actually left the Party, an issue which was clearly pertinent to the subject under inquiry.

B. THE GOVERNMENT PROVED THAT THE QUESTIONS WERE PERTINENT TO THE SUBJECT UNDER INQUIRY

1. We have shown that petitioner was apprised that the subject under inquiry was Communist activities in news media. We have also pointed out that seven of the questions on the basis of which he was convicted were clearly pertinent to this subject. Since the government introduced the transcript of the hearings at petitioner's trial, it amply proved that these questions were in fact pertinent to the subject under inquiry.

Moreover, other evidence introduced by the government at petitioner's trial showed that the subject under inquiry when petitioner testified was Communist activities in news media. The transcript of the hearings (Gov. Ex. 8) showed that, at the start of the hearings on January 4, the Chairman of the Subcommittee indicated that the purpose of the hearings was to investigate this subject. Senator

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munication, but only the identity of any person whom he had told of his resignation from the Party.

Petitioner also contends (Pet. Br. 39–40) that he answered this question by invoking the husband-wife privilege. Petitioner, however, explicitly refused to answer the question (Gov. Ex. 8, p. 1745). His reliance on the privilege in refusing to answer does not constitute a sworn answer on which the Subcommittee could rely, even though its next question assumed that petitioner may have told his wife.

Hennings reiterated that "the Committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency" and the investigation was "an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press" [11] (see *supra*, pp. 5–6). All the eighteen witnesses who testified at the hearings on January 4, 5, and 6, 1956, worked in the communications field. And the Subcommittee counsel testified at petitioner's trial that the Subcommittee was investigating "within the broad area of [Communist] tactics and strategy, within the narrower area of infiltration of mass communications" (see *supra*, p. 7).

2. Petitioner contends (Pet. Br. 24–26) that the subject under inquiry, despite "some evidence to that effect" (Pet. Br. 25), was not Communist activities in news media. This contention rests upon statements made by the Subcommittee counsel both at the hearings and petitioner's trial, by the Assistant United States Attorney at the trial, and by the district court. Since virtually the same contentions are made in *Price* v. *United States*, No. 12, this Term, which involved the same hearings, we respectfully refer the Court to our brief in that case (pp. 29–31). There we demonstrate that these statements do not prove that the Subcommittee was investigating only Com-

[11] Petitioner was apparently not present when these statements were made and therefore we do not rely on them to show that he was apprised of the subject under inquiry.

munist activities generally, since that general subject is perfectly consistent with the particularized subject of Communist activities in news media. But even if petitioner were correct that the subject under inquiry was Communist activities generally, this is a proper subject within the authority of the Subcommittee. See our brief in *Liveright, supra,* pp. 42–44. All questions which petitioner refused to answer which were pertinent to Communist activity in news media are *a fortiori* pertinent to the broader subject; indeed, the other nine questions were also pertinent, either on their face or as shown by the government's evidence at the trial, to the subject of Communist activities generally (see *supra,* pp. 18–20, 10–11).

Petitioner notes (Pet. Br. 26–27) that the Assistant United States Attorney said in his opening statement at the trial that the Subcommittee was conducting "a very broad investigation, generally speaking, of the internal security and the national security of the United States" (Tr. 6). He reasons that this statement is, like a bill of particulars, binding on the government. First, however, it seems clear from the context of the statement itself that the Assistant United States Attorney was merely describing the authority of the Subcommittee and the totality of the Subcommittee's investigations, instead of these particular hearings. Second, even if this is not correct, the subject of Communist activities in news media is perfectly consistent with the broader subject of internal security generally (just as it is consistent, as we noted above, with the subject of Communist

activity generally). There is nothing in the Assistant United States Attorney's statement suggesting that the broad subject was the only one under inquiry and that the Subcommittee was not concentrating on a narrower area within the broader subject.

Third, even if the Assistant United States Attorney meant that no particularised subject was under inquiry and even if his opening statement is as binding as a bill of particulars, we have shown in our brief in *Shelton* v. *United States*, *supra*, pp. 38–41, that the government can, unless the defendant is prejudiced, amend the bill of particulars either formally by motion or in effect by introducing evidence conflicting with the bill. Here, petitioner was not surprised or otherwise prejudiced by any inconsistency between the opening statement and the evidence introduced by the government showing that Communist activity in news media was the particular subject under inquiry. Petitioner came to the trial prepared to rebut the government's evidence that the Subcommittee was investigating Communist activity in news media since this subject was expressly stated at the hearings themselves, as petitioner clearly understood. He objected both at the hearings (see *supra*, p. 8) and at his trial (J.A. 52, 56; Tr. 211–215) that the Subcommittee's investigation infringed on freedom of the press. And if petitioner had been surprised by the evidence introduced by the government at his trial, he should have moved for a continuance to allow him to prepare his defense. See *United States* v. *Neff*, 212 F. 2d 297 (C.A. 3).

3. Petitioner contends that, assuming *arguendo* the subject under inquiry to have been Communist activities in news media, nevertheless the questions were not pertinent to the subject. First, he says, the questions as to "[t]he identity of individuals engaged in lawful associational and political activities * * * is not 'clearly pertinent'" (Pet. Br. 35). Most of the questions, however, did not seek the identity of other persons (see *supra*, pp. 18–20). As to those that did, we show below that the identity of the people who engage in Communist activities is plainly part of an investigation into those activities (see *infra*, pp. 48–50). This Court upheld the pertinency of questions concerning lawful activities in *Barenblatt, Wilkinson* v. *United States*, 365 U.S. 399, and *Braden* v. *United States*, 365 U.S. 431, on the ground that they were clearly pertinent to an investigation of an aspect of Communist activity. 360 U.S. at 114–125; 365 U.S. at 414–415; 365 U.S. at 433. And in those three cases the Court also upheld the constitutionality under the First Amendment of investigations of lawful Communist activities because of their close connection with the illegal aims and methods of the Party (see *supra*, pp. 25–27).

Second, petitioner contends (Pet. Br. 33–38) that the questions were not pertinent because they related to events which were too remote in time. But in order to determine, and particularly to understand, the present and future activities of the Communist Party, the Subcommittee must of necessity inquire a considerable distance into the past. The questions petitioner refused to answer concerned Communist activities from 1935 up to the time of the inquiry

in 1956. At the very least, the questions in count 6, which related to petitioner's associates in a Party cell in the New York Herald Tribune between 1943 and 1951, count 7, as to whether any members of that cell were still employed by the Herald Tribune in 1956, and count 8, concerning whether he told anyone when he left the Party in 1948, were plainly not remote.[14] In *Barenblatt*, this Court held (360 U.S. at 125) that the "pertinency" of "questions as to [the witness'] own Communist Party affiliations," including membership in a Communist Club between 1947 and 1950 (*id.* at 114), "was clear beyond doubt" to an investigation of Communist activities in education conducted in 1954.

The *amicus curiae* argues (*Amicus* Br. 11–14) that the questions were not pertinent since they sought the names of other persons. First, we repeat that answers to most of the questions would not have required petitioner to disclose the names of other persons (see *supra*, pp. 18–20). In any event, the disclosure of other persons engaged in Communist activities is, and was in this case, pertinent to the subject under inquiry for at least two legitimate purposes: first, to obtain information concerning the number and importance of persons engaged in the Communist activity under inquiry; and, second, to discover new witnesses who might have information concerning Communist activity not known to the witness or the committee.

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[14] As stated above (p. 20), petitioner's conviction must be sustained as long as any one of the counts is upheld.

We know of no judicial decision holding that personnel is not pertinent to the subject of Communist activity. On the contrary, the Court of Appeals for the District of Columbia Circuit has explicitly held in *Barsky* v. *United States*, 167 F. 2d 241, 246 (C.A. D.C.), certiorari denied, 334 U.S. 843:

> If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject.

Accord, *Morford* v. *United States*, 176 F. 2d 54, 57 (C.A. D.C.), reversed on other grounds, 339 U.S. 258. Similarly, in *McPhaul* v. *United States*, 364 U.S. 372, 381, this Court recently held, with regard to the pertinency of records subpoenaed from the Civil Rights Congress:

> It would seem clear enough that the auspices under which the Civil Rights Congress was organized, the *identity and extent of its affiliations, the source of its funds and to whom distributed* would be prime considerations in determining whether the organization was being used by the Communists in the Detroit area. If the Civil Rights Congress was affiliated with known Communist organizations, or if its funds were received from such organizations or were used to support Communist activities in the Detroit area, those facts, it is reasonable to suppose, would be shown by the records called for by the subpoena, and those facts would be

> highly pertinent to the Subcommittee's inquiry [into Communist activity in the Detroit area]. [Emphasis added.]

Cf. *United States* v. *Bryan*, 339 U.S. 323; *United States* v. *Fleischman*, 339 U.S. 349. In short, both logically and by judicial precedent, the disclosure of names of other persons engaged in the Communist activity under scrutiny is just as pertinent to an investigation of an aspect of Communist activity as is the disclosure whether the witness himself is a Party member.

IV

THE SUBCOMMITTEE WAS NOT REQUIRED TO APPRISE PETITIONER OF THE SOURCE OF ITS AUTHORITY

Petitioner contends (Pet. Br. 50–52) that the Subcommittee failed to apprise him of the source of its authority from the Senate. This contention is unsound for three reasons.

First, petitioner did not even suggest this objection when he appeared before the Subcommittee. While he claimed that the Subcommittee had no constitutional power to question him since the inquiry violated the First Amendment, he did not contest that the Senate had purported to give the Subcommittee authority to investigate Communist activities (see *supra*, pp. 8–9). We have shown in our brief in *Shelton* v. *United States*, *supra*, pp. 26–29, that, unless a witness objects before the committee to the pertinency of the questions, he cannot claim at his trial that the committee failed to apprise him of this pertinency. By the same reasoning, petitioner cannot claim that the Subcommittee failed to apprise him of some of its

authority, when he did not claim before the Subcommittee that the Senate had not authorized the investigation. If petitioner had objected, the Subcommittee could easily have apprised the witness of the source of its authority, just as it could have specifically explained the pertinency of the questions.

Second, while petitioner claimed below that Senate Resolution 366 did not authorize this inquiry, he did not raise the distinct issue whether the Subcommittee told him that its authority was based on this resolution. Petitioner cannot raise the latter issue in this Court for the first time (see *supra*, p. 23).

In any event, *Watkins* v. *United States*, 354 U.S. 178, and *Barenblatt* require only that Congressional committees apprise witnesses, upon proper objection, of the subject under inquiry and the pertinency of the questions. In *Watkins*, the Court did state that the witness has the right to be informed of the "standard of criminality before the commission of the alleged offense" and "[p]art of the standard of criminality * * * is the pertinency of the questions * * *" (354 U.S. at 208). Similarly, it is possible to argue that the Senate's authorizing resolution is part of the standard of criminality. But there was no need for the Subcommittee to apprise petitioner of the source of its authority since the authority of the Committee is contained in the authorizing resolutions (S. Res. 366, 81st Cong., 2d Sess.; S. Res. 174, 84th Cong., 2d Sess.), which are public documents that are readily available. In contrast, the subject under inquiry and therefore the pertinency of the questions can only be obtained from the committee itself.

V

THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECT UNDER INQUIRY OR THE PERTINENCY OF THE QUESTIONS TO THIS SUBJECT, OR TO STATE THE DELEGATION OF AUTHORITY FROM THE PARENT COMMITTEE TO THE SUBCOMMITTEE

The indictment upon which petitioner was convicted alleged that hearings were being conducted "pursuant to * * * Senate Resolutions 366 of the 81st Congress and 58 of the 84th Congress" and that the questions "were pertinent to the question then under inquiry" (J.A. 4). Petitioner claims (Pet. Br. 58–65) that the indictment was invalid because it failed (1) to specify the subject under inquiry when petitioner testified, (2) to specify the pertinency of the questions to this subject, and (3) to state the delegation of authority from the parent Judiciary Committee to the Subcommittee.

As we have shown in our brief in *Shelton* v. *United States, supra,* pp. 78–83, petitioner's contention that the indictment was required to state the subject under inquiry is inconsistent with Rule 7(c) of the Federal Rules of Criminal Procedure and with decisions both of this Court and the courts of appeals. While petitioner suggests that he needed to know the exact subject under inquiry in order to prepare his defense as we have seen (pp. 40–41, 43–45), this was clearly shown by the transcript of the hearings which was available to him. Moreover, the fact that petitioner did not even attempt to secure this information by moving for a bill of particulars strongly indicates that he understood the subject under inquiry. Although it is true, as we show in our brief in *Shelton,* pp. 38–40, that the government is not

irrevocably bound in its proof at trial by the bill of particulars, the defendant is entitled to be protected from prejudice if the government introduces evidence conflicting with the bill. The trial court would not be required to allow the government to introduce the evidence and, if it did do so, it must allow the defendant a reasonable time to prepare his defense.

For the same reasons that the indictment is not required to specify the subject under inquiry, an indictment which states that the questions are pertinent to the subject under inquiry need not provide the specific reasoning underlying this allegation of pertinency. As we show in our brief in *Price* v. *United States,* No. 12, this Term, p. 34, the indictment properly alleged the authority of the Subcommittee.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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NOVEMBER 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

FILE COPY

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 10

ALDEN WHITMAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE GOVERNMENT HAS ONCE AGAIN SUGGESTED A NEW AND DIFFERENT "QUESTION UNDER INQUIRY"

In its brief in opposition, the Government claimed that the "question under inquiry" was "Communist infiltration of the press" (Br. Opp. pp. 11, 12, 18, 19). It now asserts that the question under inquiry was "Communist activities in the news media" (Br. pp. 16,

40, 41, 43, 44, 45, 46). We assert that this is a substantive, rather than a literary, change.

A. The change from "infiltration" to "activities"

In its brief in opposition in this case (Br. Opp. p. 10, fn. 4) and in its brief in *Liveright* v. *U. S.*, No. 11, this Term, pp. 20-25, the Government attempts to meet the argument that clause 3 of Senate Resolution 366 is unconstitutionally vague by stating that it is to be read *in pari materia* with Clauses 1 and 2, so that "the meaning of the phrase 'subversive activities' is confined to activities of at least the 'same general class' as 'espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organiantions controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence' ". (*id.*, p. 23)[1] While a colorable,

[1] If the Government's reading is correct, and we think there is much to recommend this construction, it is also dispositive of this case. Petitioner made it entirely clear that he had not engaged in any such activities, and that he had no knowledge of any (See Br. pp. 7-11 and *passim* elsewhere). There is nothing in the legislative history of the Resolution to suggest that the Senate was authorizing an inquiry into past lawful political activity, and any such resolution would raise serious Constitutional problems. *U. S.* v. *Rumely*, 345 U.S. 41, 46-47. Since petitioner's information all ante-dated 1948, no question asked could be pertinent to Clause 1 of Sen. Res. 366, authorizing an investigation into the "administration, operation and enforcement of the Internal Security Act of 1950". And since his knowledge related solely to lawful political activity, it could not fall within the ambit of Clause 2, relating to the "administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States". Indeed, Counsel for the Committee freely admitted that none of the questions asked during this investigation used the words espionage, sabotage, or the overthrow of the Government by force or violence (R. 32-33). Contrary to

though in our view untenable, argument can be made that "Communist activities," without more, come within the Resolution as so read, the "infiltration" referred to in Clause 3 must be "by persons who are or may be under the domination of the foreign government . . ." Of the latter, there is no slightest evidence, and petitioner's statements to the Subcommittee and testimony to the contrary are unchallenged. The introduction of this new reading in *Liveright*, and in this case, has thus once more impelled the Government to change the asserted subject under inquiry, which has so characterised the progress of this case (See Br. App. A).

B. The change from "press" to "news media"

Our brief relied heavily on the facts that a) during the hearings, Committee Counsel expressly denied that "Communist infiltration of the press" was the subject under inquiry (Br. pp. 22, 25, 28), as contended by the Government, and b) that most of the questions asked petitioner had no relationship to the press (Br. pp. 24-25). By the Government's convenient, though unwarranted, broadening of the asserted scope of the

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the Government's position here, Committee Counsel defended the general authority of the Subcommittee to inquire into lawful political activities and beliefs (R. 32). Under the Government's reading of the authorizing resolution, the questions asked petitioner clearly lay outside the competence of both the Committee and the Subcommittee.

A certain gloss on the Congressional yardstick of relevance in this context is to be found in the provisions of Section 504(a) of the Landrum-Griffin Act (Public Law 86-257, 86th Cong. S. 1555; 73 Stat. 519) prohibiting the holding of union office by persons for a period of five years after they have been members of the Communist Party, subject to diminution in some cases. Thus, the Congress has expressly recognized the irrelevance of Communist Party membership more than five years past.

inquiry, it is enabled to sidestep both these contentions. We attach significance to the fact that the Government makes no serious attempt to meet them otherwise.[2] In *Shelton* v. *U. S.*, No. 9, this Term, the Government more fully develops its asserted right to change its theory of the case at each stage (Br. pp. 38-40); in our principal brief we have argued that no such right exists (pp. 26-28, 58-65). The question must be what the subject under inquiry was when the petitioner "had to decide at his peril whether or not to answer" (*Watkins* v. *U. S.*, 354 U.S. 178, 214); not what the Government nearly six years later asserts it might have been.

2. PETITIONER WAS NOT SEEKING TO PROTECT THE CONSTITUTIONAL RIGHTS OF OTHER PERSONS; HE WOULD HAVE BEEN WITHIN HIS RIGHTS HAD HE SOUGHT TO DO SO.

A principal contention of the Government is that petitioner has no standing to "raise the First Amendment rights of other persons" (Br. pp. 28-34). This is the first time this suggestion has appeared in this litigation. Petitioner based his refusal to answer firmly on his own Constitutional rights (Br. pp. 9-11), which the Government with unseemly cynicism now dismisses as "moral scruples" or "moral beliefs which are not protected by the First Amendment" (Br. p. 28). At no time has it been asserted that petitioner was protecting the rights of others, and the Government raises a straw man in so arguing.

It is, of course, entirely clear that petitioner sought to avoid needless harm to innocent third parties. The Government gratuitously assumes that he was moti-

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[2] Despite this change in terminology, it still remains true that a substantial portion of the questions asked petitioner had no relationship to "news media".

vated by "no more intimate connection with himself than friendship" (Br. p. 35), as if this would be reprehensible were it the case. But there is no slightest evidence of this; since he had left the Party some eight years prior to his interrogation a more probable inference is that he had no connection whatsoever with his former associates. But seeking to protect others from unwarranted harm is not the same as asserting their Constitutional rights. Petitioner quite explicitly defended his own right not to do the "mean and ignoble thing", not to be the "vector, the agent to bring destruction on people" (Br. p. 10). No more intimately personal Constitutional right can be asserted.

In such a case, it is the witness' right of association which is asserted. If the citizen of probity and conscience, may be required to play the role of "the tattletale, the squealer and the informer" when a changing political climate makes odious what is presently regarded as lawful political activity, or face the threat of a prison term for contempt, he has but one choice: to engage in no political activities with others. This is a present infringement of a present undoubted right to engage in lawful political activities and associations; a deprivation of rights because of what the Government dismisses as mere "moral scruples". We say petitioner not only has standing to raise this right, but that this is what "the right of the people peaceably to assemble" means.

Even if the Government, contrary to the fact, be right in contending that petitioner sought to protect the Constitutional rights of others, he may properly do so. The Government correctly notes that in *Uphaus* v. *Wyman*, 360 U.S. 72, 77-78, this Court "refused to decide this question" (Br. pp. 32-33). We suggest that this must be for the reason succinctly stated by

the minority of the Court (at page 97) that "if the members of the assemblage could only plead their assembly rights themselves, the very interest being safeguarded by the Constitution here could never be protected meaningfully, since to require that the guests claim this right themselves would 'result in nullification of the right at the moment of its assertion' ". If "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs" (*Sinclair* v. *U. S.*, 279 U.S. 263, 292) must be publicly asserted, all privacy effectively vanishes.

But the Government takes entirely too narrow a view of the issue. The total interest in freedom of association is to be weighed. As in *Smith* v. *California*, 361 U.S. 147, at page 154,

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded".

Just as the bookseller's rights are to be measured in terms of their relation to the freedom of the reading public, so petitioner's rights are properly measured by the total impact on all citizens, whether they are present to assert their rights or not. This was precisely the course followed by this Court in *Watkins* v. *U. S.*, 354 U.S. 178, 197-98, and *Thornhill* v. *Alabama*, 310 U.S. 88, 101-106.

Happily, this Court has not been as ready as the Government to dismiss "moral scruples" as irrelevant. *Board of Education* v. *Barnette*, 319 U.S. 624. And

see Mr. Justice Frankfurter, dissenting in *U. S.* v. *Nugent*, 346 U.S. 1, 12-13; Williams, *The Reluctance to Inform*, XIV Theology Today (July, 1957), pp. 229 *et seq.*

3. ALL ISSUES ARE PROPERLY BEFORE THIS COURT

The Government repeatedly contends that the issues raised by petitioner are not properly before the Court,[3] because they were not previously raised. As we pointed out in our principal brief (p. 3 and elsewhere), petitioner explicitly raised the questions of the authority of the Subcommittee and the pertinency of the questions at the outset of the hearing, and throughout its course.[4] This was clearly sufficient to raise these issues. *Hale* v. *Henkel*, 201 U.S. 43.

Further, these matters are not personal privileges, such as the Fifth Amendment, which the witness is required to assert, (cf. *Rogers* v. *U. S.*, 340 U.S. 367), but substantive elements of the crime which the Government must prove. The statute itself requires that the witness be summoned "by the authority of either House of Congress", and the Government therefore must establish that the Subcommittee was duly authorized. (See Br. p. 50; *Christoffel* v. *U. S.*, 338 U.S. 84; *Peters* v. *Hobby*, 349 U.S. 331, 338. It is the statute which requires that the question be "pertinent

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[3] That the Subcommittee was not properly authorized (Br. 9); that the Subcommittee did not authorize the inquiry (Br. p. 23); that the question under Count 10 was unconstitutionally vague (Br. p. 41, n. 11); that the Subcommittee failed to apprize petitioner of the pertinency of the questions (Br. pp. 38-40), or of its authority to conduct the inquiry (Br. p. 51); that the questions were not pertinent to the inquiry (Br. p. 38).

[4] See *Hearings*, pp. 1739 (twice), 1740, 1741, 1742, 1743, 1744, 1746, 1747, 1748 (twice), 1749, 1750 (twice), 1752, 1753, 1755.

to the question under inquiry" *Deutch* v. *U. S.*, 367 U.S. 456, 468. Vagueness of the question need not be raised at the hearing to be asserted. *O'Connor* v. *U. S.*, 240 F. 2d 404, 405 (CADC). Unlike *Barenblatt* (see 360 U.S. at 123), petitioner's objections were not a mere anticipatory refusal to answer, but were made with repeated reference to specific questions. Cf. *Raley* v. *Ohio*, 360 U.S. 423, 439; *Flaxer* v. *U. S.*, 358 U.S. 147, 151. The Government is not correct in stating (Govt. Br. No. 9, p. 28) that *Barenblatt* decided that the issue of pertinency must be raised before the Committee. See *Wilkinson* v. *U. S.*, 365 U.S. 399, 413, fn. 10; *Deutch* v. *U. S.*, 367 U.S. 456, 469; *Quinn* v. *U. S.*, 349 U.S. 155.

The Government asserts (Br. p. 27) that the questions in nine counts of the indictment did not require "the disclosure of their (others') identity". While it is true that they did not in terms ask the names of other persons, they were each designed to make the identification of other persons easily possible. (See Brief *Amicus*, p. 3). Petitioner made it entirely clear in his statement (*Hearings*, p. 1746) that he would answer all questions except those designed to reveal the names of others. If, in fact, these questions had some purpose other than identification, the Committee should so have informed petitioner; for the Government now to suggest that they might have had some purpose other than that understood by him, and made known to the Subcommittee, is a form of deception and entrapment.

CONCLUSION

We believe it to be a fair summary of all the cases relied on by the Government that in each a Congressional Committee, or another body, was seeking infor-

mation concerning *present* Communist Party membership or activity. We are aware of no case in which this Court has sustained the power of compulsory disclosure with respect to lawful political activity or associations (albeit within the Communist Party) in the remote past. The dividing line clearly appears to be that the former may be pertinent to the inquiry, whatever form it may take, and that the latter are not. On this ground, the judgment of conviction here should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 8, 9, 10, 11, 12 AND 128.—OCTOBER TERM, 1961.

Norton Anthony Russell, Petitioner, v. United States.	
8	
Robert Shelton, Petitioner, v. United States.	
9	
Alden Whitman, Petitioner, v. United States.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
10	
Herman Liveright, Petitioner, v. United States.	
11	
William A. Price, Petitioner, v. United States.	
12	
John T. Gojack, Petitioner, v. United States.	
128	

[May 21, 1962.]

MR. JUSTICE STEWART delivered the opinion of the Court.

In these six cases we review judgments of the Court of Appeals for the District of Columbia,[1] which affirmed convictions obtained in the District Court under 2 U. S. C.

[1] 280 F. 2d 688; 280 F. 2d 701; 281 F. 2d 59; 280 F. 2d 708; 280 F. 2d 715; 280 F. 2d 678.

§ 192.[2] Each of the petitioners was convicted for refusing to answer certain questions when summoned before a congressional subcommittee.[3] The cases were separately briefed and argued here, and many issues were presented. We decide each case upon a single ground common to all, and we therefore reach no other questions.

In each case the indictment returned by the grand jury failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated. The indictments were practically identical in this respect, stating only that the questions to which answers were refused "were pertinent to the question then under inquiry" by the subcommittee.[4] In each case a motion

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[2] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." 2 U. S. C. § 192.

[3] No. 8 and No. 128 grew out of hearings before subcommittees of the House Committee on Un-American Activities. The other four cases grew out of hearings before the Internal Security Subcommittee of the Senate Judiciary Committee.

[4] The indictment in No. 8 is typical:

"The Grand Jury charges:

"INTRODUCTION

"On November 17, 1954, in the District of Columbia, a subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session, (60 Stat. 828), and to H. Res. 5, 83d Congress.

"Defendant, Norton Anthony Russell, appeared as a witness before that subcommittee, at the place and on the date above stated, and

was filed to quash the indictment before trial upon the ground that the indictment failed to state the subject under investigation at the time of the subcommittee's interrogation of the defendant.[5] In each case the motion was denied. In each case the issue thus raised was preserved on appeal, in the petition for writ of certiorari, and in brief and argument here.

Congress has expressly provided that no one can be prosecuted under 2 U. S. C. § 192 except upon indictment by a grand jury.[6] This Court has never decided whether

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was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant and which he refused to answer."

(The questions which Russell allegedly refused to answer were then quoted verbatim under separately numbered counts.)

[5] The motion in No. 9 is typical:

"The defendant moves that the indictment be dismissed on the following grounds:

"1. The indictment fails to plead the following essential and material elements of the offense:

. . . . .

"c. the nature of the 'question then under inquiry' to which the questions addressed to defendant are alleged to be relevant."

[6] 2 U. S. C. § 194 provides:

"Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President

the indictment must identify the subject which was under inquiry at the time of the defendant's alleged default or refusal to answer.[1] For the reasons that follow, we hold that the indictment must contain such an averment, and we accordingly reverse the judgments before us.

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of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

[1] The question was presented but not reached in *Sacher* v. *United States*, 356 U. S. 576, where the conviction was reversed on other grounds. The question was also raised in the petition for certiorari in *Braden* v. *United States*, 365 U. S. 431, but was abandoned when the case was briefed and argued on the merits. Although the question was decided by the lower court in *Barenblatt* v. *United States*, 240 F. 2d 875, it was not raised in this Court, 360 U. S. 109.

The Court of Appeals for the District of Columbia Circuit has passed on the question, holding that the indictment need not set forth the subject under committee inquiry. See *Barenblatt* v. *United States*, 240 F. 2d 875; *Sacher* v. *United States*, 252 F. 2d 528. Indictments returned in that circuit of course reflect this rule. See cases cited in MR. JUSTICE HARLAN's dissenting opinion, post, p. —, n. 2. The Court of Appeals for the Second Circuit sustained an indictment under 2 U. S. C. § 192 which did not set forth the subject under inquiry in *United States* v. *Josephson*, 165 F. 2d 82. However, *Josephson* appears to have been substantially limited by the same court in *United States* v. *Lamont*, 236 F. 2d 312, and indictments under 2 U. S. C. § 192 currently being returned in the Second Circuit do in fact set forth the subject under inquiry. See the unreported indictments in *United States* v. *Yarus* (D. C. S. D. N. Y.) No. C 152-220 (the opinion acquitting defendant Yarus is reported at 168 F. Supp. 625); *United States* v. *Tweel* (D. C. W. D. N. Y.) No. 7536-C (the opinion of the Court of Appeals reversing defendant Tweel's conviction is reported at 291 F. 2d 804).

No other Court of Appeals has passed squarely on the point. In *Braden* v. *United States*, 272 F. 2d 668, the Court of Appeals for the Fifth Circuit ruled that the indictment need not explain how and why the questions were pertinent to the subject under inquiry, but did not discuss whether the subject itself had to be specified. In

In enacting the criminal statute under which these petitioners were convicted Congress invoked the aid of the federal judicial system in protecting itself against contumacious conduct. *Watkins* v. *United States*, 354 U. S. 178, 207. The obvious consequence, as the Court has repeatedly emphasized, was to confer upon the federal courts the duty to accord a person prosecuted for this statutory offense every safeguard which the law accords in all other federal criminal cases. *Sinclair* v. *United States*, 279 U. S. 263, 296–297; *Watkins* v. *United States*, *supra*, at 208; *Sacher* v. *United States*, 356 U. S. 576, 577; *Flaxer* v. *United States*, 358 U. S. 147, 151; *Deutch* v. *United States*, 367 U. S. 456, 471.

Recognizing this elementary concept, the *Sinclair* case established several propositions which provide a relevant starting point here. First, there can be criminality under the statute only if the question which the witness refused to answer pertained to a subject then under investigation by the congressional body which summoned him. "[A] witness rightfully may refuse to answer where . . . the questions asked are not pertinent to the matter under inquiry." *Sinclair* v. *United States*, *supra*, at 292. Secondly, because the defendant is presumed to be innocent, it is "incumbent upon the United States to plead and show that the question [he refused to answer] pertained to some matter under investigation." *Id.*, at 296–297. Finally, *Sinclair* held that the question of

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a number of other recent cases arising under 2 U. S. C. § 192 the indictments have stated the subject under inquiry. See, in addition to the examples cited above, the indictment set forth in *Yellin* v. *United States*, 287 F. 2d 202, 203, n. 2 (C. A. 7th Cir.); the indictment described in *Davis* v. *United States*, 269 F. 2d 357, 359 (C. A. 6th Cir.); and the unreported indictment in *United States* v. *Loreh* (D. C. S. D. Ohio) Cr. No. 3185 (an indictment arising out of the same series of hearings in which Russell, the petitioner in No. 8, was initially summoned to testify).

pertinency is one for determination by the court as a matter of law. *Id.*, at 298.

In that case the Court had before it an indictment which set out in specific and lengthy detail the subject under investigation by the Senate Committee which had summoned Sinclair. The Court was thereby enabled to make an enlightened and precise determination that the question he had refused to answer was pertinent to that subject. *Id.*, at 285–289, 296–298.

That the making of such a determination would be a vital function of the federal judiciary in a prosecution brought under 2 U. S. C. § 192 was clearly foreseen by the Congress which originally enacted the law in 1857.[8] Congress not only provided that a person could be prosecuted only upon an indictment by a grand jury, but, as the record of the legislative debates shows, Congress was expressly aware that pertinency to the subject under inquiry was the basic preliminary question which the federal courts were going to have to decide in determin-

[8] 11 Stat. 155–156. The statute, now 2 U. S. C. §§ 192–194, was enacted to supplement the established contempt power of Congress itself. *Jurney* v. *MacCracken*, 294 U. S. 125, 151. The specific background of the statute's adoption is sketched in *Watkins* v. *United States*, 354 U. S., at 207, n. 45. See Cong. Globe, 34th Cong., 3d Sess. 405. See also *id.*, at 403–413, 426–433, 434–445. Except for a basic change in the immunity provisions in 1862, 12 Stat. 333, the legislation has continued substantially unchanged to the present time, with only a slight modification in language in R. S. §§ 102 and 104. The only other amendment in the substantive provisions was made in 1938, 52 Stat. 942, so as to make the statute applicable to joint committees. The provision requiring grand jury indictment has been amended twice since 1857. The original legislation provided for certification only to the United States Attorney for the District of Columbia. In 1936 an amendment was made to permit certification to any United States Attorney, 49 Stat. 2041. In 1938 the provision was amended to bring it into accord with the joint committee amendment of the substantive provisions of the law.

ing whether a criminal offense had been alleged or proved. The principal spokesman for the bill, Senator Bayard, repeatedly made this very point:

> "The bill provides for punishing a witness who shall refuse to answer any question 'pertinent' to the matter of inquiry under consideration before the House or its committee. If he refuses to answer an irrelevant question, he is not subject to the penalties of the bill. The question must be pertinent to the subject-matter, and that will have to be decided by the courts of justice on the indictment. That power is not given to Congress; it is given appropriately to the judiciary." Cong. Globe, 34th Cong., 3d Sess. 439 (1857).
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> "This law does not propose to give to this miscellaneous political body the power of punishment; but one of its greatest recommendations is, that it transfers that power of punishment to a court of justice after judicial inquiry. All that is to be done in the case of a refusal to testify is to certify the fact to the district attorney, who is to lay it before the grand jury, and if the party is indicted he is bound to answer according to the terms of the law, as any other person would for an offense against the laws of the land. . . . I am aware that legislative bodies have transcended their powers—that under the influence of passion and political excitement they have very often invaded the rights of individuals, and may have invaded the rights of coördinate branches of the Government; but if our institutions are to last, there can be no greater safeguard than will result from transferring that which now stands on an indefinite power (the punishment as well as the offense resting

in the breast of either House) from Congress to the courts of justice. When a case of this kind comes before a court, will not the first inquiry be, have Congress jurisdiction of the subject-matter?—has the House which undertakes to inquire, jurisdiction of the subject? If they have not, the whole proceedings are *coram non judice* and void, and the party cannot be held liable under indictment. The Court would quash the indictment if this fact appeared on its face; and if it appeared on the trial they would direct the jury to acquit." Cong. Globe, 34th Cong., 3d Sess. 440 (1857).

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". . . The law prescribes that, in case of such refusal, the House shall certify the fact to the district attorney, and he shall bring the matter before the grand jury. When that comes up by indictment before the court, must not the court decide whether the question put was pertinent to the inquiry? Of course they must; and they cannot hold the party guilty without doing it." Cong. Globe, 34th Cong., 3d Sess. 444–445 (1857).

These forecasts of the office which the federal courts would be called upon to perform under 2 U. S. C. § 192 have been amply borne out by the cases which have arisen under the statute. The crucial importance of determining the issue of pertinency is reflected in many cases which have come here since *Sinclair*, *supra*. *Watkins* v. *United States*, 354 U. S. 178, 208; *Sacher* v. *United States*, 356 U. S. 576, 577; *Barenblatt* v. *United States*, 360 U. S. 109, 123–125; *Wilkinson* v. *United States*, 365 U. S. 399, 407–409, 413; *Braden* v. *United States*, 365 U. S. 431, 435–436; *Deutch* v. *United States*, 367 U. S. 456, 467–471. Our decisions have pointed out that the obvious first step in determining whether the questions asked were perti-

nent to the subject under inquiry is to ascertain what that subject was. See, *e. g.*, *Deutch* v. *United States*, *supra*, at 469. Identification of the subject under inquiry is also an essential preliminary to the determination of a host of other issues which typically arise in prosecutions under the statute. In *Wilkinson* v. *United States*, *supra*, for example, the Court pointed out that in order properly to consider any of the many issues there presented, "the starting point must be to determine the subject matter of the subcommittee's inquiry." 365 U. S., at 407.

Where, as in the *Sinclair* case, the subject under inquiry has been identified in the indictment, this essential first step has presented no problem. Where, as in the more recent cases, the indictment has not identified the topic under inquiry, the Court has often found it difficult or impossible to ascertain what the subject was. The difficulty of such a determination in the absence of an allegation in the indictment is illustrated by *Deutch* v. *United States*, *supra*. In that case the members of this Court were in sharp disagreement as to what the subject under subcommittee inquiry had been. Moreover, all of us disagreed with the District Court's theory, and the Court of Appeals had not even ventured a view on the question. 367 U. S., at 467. In *Watkins* v. *United States*, *supra*, the Court found it not merely difficult, but actually impossible, to determine what the topic under subcommittee inquiry had been at the time the petitioner had refused to answer the questions addressed to him. "Having exhausted the several possible indicia of the 'question under inquiry,' we remain unenlightened as to the subject to which the questions asked petitioner were pertinent." 354 U. S., at 214.*

* In the *Watkins* case the Court's primary concern was not whether pertinency had been proved at the criminal trial, but whether the petitioner had been apprised of the pertinency of the questions at the time he had been called upon to answer them. These two issues

To be sure, the fact that difficulties and doubts have beset the federal courts in trying to ascertain the subject under inquiry in cases arising under 2 U. S. C. § 192, could hardly justify, in the abstract, a requirement that indictments under the statute contain averments which would simplify the courts' task. Difficult and doubtful questions are inherent in the judicial process, particularly under a system of criminal law which places heavy emphasis upon the protection of the rights and liberties of the individual. Courts sit to resolve just such questions, and rules of law are not to be made merely to suit judicial convenience. But a proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum. And the repeated appearance in prosecutions under a particular criminal statute of the same critical and difficult question, which could be obviated by a simple averment in the indictment, invites inquiry into the purposes and functions which a grand jury indictment is intended to serve. The cases we have discussed, therefore, furnish an appropriate background for the inquiry to which we now turn.

Any discussion of the purpose served by a grand jury indictment in the administration of federal criminal law must begin with the Fifth and Sixth Amendments to the Constitution. The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." We need not pause to

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are, of course, quite different. See *Deutch* v. *United States*, 367 U. S., at 467–468. But identification of the subject under inquiry is essential to the determination of either issue. See *Barenblatt* v. *United States*, 360 U. S., at 123–125.

consider whether an offense under 2 U. S. C. § 192 is an "infamous crime," *Duke* v. *United States*, 301 U. S. 492, since Congress has from the beginning explicitly conferred upon those prosecuted under the statute the protection which the Fifth Amendment confers, by providing that no one can be prosecuted for this offense except upon an indictment by a grand jury. This specific guaranty, as well as the Fifth Amendment's Due Process Clause, are, therefore, both brought to bear here. Of like relevance is the guaranty of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

The constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury has first intervened reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166.[10] "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Costello* v. *United States*, 350 U. S. 359, 362. See McClintock, Indictment by a Grand Jury, 26 Minn. L. Rev. 153; Orfield, Criminal Procedure from Arrest to Appeal, 137–140, 144–146.

For many years the federal courts were guided in their judgments concerning the construction and sufficiency of grand jury indictments by the common law alone. Not until 1872 did Congress enact general legislation touch-

[10] See I Holdsworth, History of English Law (7th ed. 1956), 321–323; I Pollock and Maitland, History of English Law (2d ed. 1909), 137–155, and Vol. II, pp. 647–653.

ing upon the subject. In that year a statute was enacted which reflected the drift of the law away from the rules of technical and formalized pleading which had characterized an earlier era. The 1872 statute provided that "no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." 17 Stat. 198. This legislation has now been repealed, but its substance is preserved in the more generalized provision of Rule 52 (a) of the Federal Rules of Criminal Procedure, which states that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." [11]

There was apparently no other legislation dealing with the subject of indictments generally until the promulgation of Rule 7 (c), Fed. Rules Crim. Proc., in 1946. The Rule provides:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information

[11] The 1872 statute became Rev. Stat. 1025 and ultimately 18 U. S. C. § 556. The statute was repealed in the 1948 legislative reorganization of Title 18, 62 Stat. 862, because its substance was contained in Fed. Rules Crim. Proc., 52 (a).

> shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

As we have elsewhere noted, "This Court has, in recent years, upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused. [Citing cases.] This has been a salutary development in the criminal law." *Smith* v. *United States*, 360 U. S. 1, 9. "But," as the *Smith* opinion went on to point out, "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." *Ibid.* Resolution of the issue presented in the cases before us thus ultimately depends upon the nature of "the substantial safeguards" to a criminal defendant which an indictment is designed to provide. Stated concretely, does the omission from an indictment under 2 U. S. C. § 192 of the subject under congressional committee inquiry amount to no more than a technical deficiency of no prejudice to the defendant? Or does such an omission deprive the defendant of one of the significant protections which the guaranty of a grand jury indictment was intended to confer?

In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These critera are first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'"

and, secondly, " 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre* v. *United States*, 157 U. S. 286, 290; *Rosen* v. *United States*, 161 U. S. 29, 34." *Hagner* v. *United States*, 285 U. S. 427, 431. See *Potter* v. *United States*, 155 U. S. 438, 445; *Bartell* v. *United States*, 227 U. S. 427, 431; *Berger* v. *United States*, 295 U. S. 78, 82; *United States* v. *Debrow*, 346 U. S. 374, 377–378.

Without doubt the second of these preliminary criteria was sufficiently met by the indictments in these cases. Since the indictments set out not only the times and places of the hearings at which the petitioners refused to testify, but also specified the precise questions which they then and there refused to answer, it can hardly be doubted that the petitioners would be fully protected from again being put in jeopardy for the same offense, particularly when it is remembered that they could rely upon other parts of the present record in the event that future proceedings should be taken against them. See McClintock, Indictment by a Grand Jury, 26 Minn. L. Rev. 153, 160; *Bartell* v. *United States*, 227 U. S. 427, 433. The vice of these indictments, rather, is that they failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, *i. e.*, that they failed to sufficiently apprise the defendant "of what he must be prepared to meet."

As has been pointed out, the very core of criminality under 2 U. S. C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.

"It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'" *United States* v. *Cruikshank*, 92 U. S. 542, 558. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute." *United States* v. *Simmons*, 96 U. S. 360, 362. "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . ." *United States* v. *Carll*, 105 U. S. 611, 612. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States* v. *Hess*, 124 U. S. 483, 487. See also *Pettibone* v. *United States*, 148 U. S. 197, 202–204; *Blitz* v. *United States*, 153 U. S. 308, 315; *Keck* v. *United States*, 172 U. S. 434, 437; *Morissette* v. *United States*, 342 U. S. 246, 270, n. 30. Cf. *United States* v. *Petrillo*, 332 U. S. 1, 10–11.[12] That these basic principles of fundamental

[12] *Rosen* v. *United States*, 161 U. S. 29, heavily relied upon in the dissenting opinion, is inapposite. In that case the Court held that an indictment charging the mailing of obscene material did not need to specify the particular portions of the publication which were allegedly obscene. As pointed out in *Bartell* v. *United States*, 227 U. S. 427, 431, the rule established in *Rosen* was always regarded as a "well recognized exception" to usual indictment rules, applicable only to "the pleading of printed or written matter which is alleged to be

fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.[13]

The vice which inheres in the failure of an indictment under 2 U. S. C. § 192 to identify the subject under inquiry is thus the violation of the basic principle "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, . . ." *United States* v. *Simmons*, *supra*, at 362. A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. *Cole* v. *Arkansas*, 333 U. S. 196, 201–202. And the unfairness and uncertainty which have characteristically infected criminal proceedings under this statute which were based upon indictments which failed to specify the subject under inquiry are illustrated by the cases in this Court we have already discussed. The same uncertainty and unfairness are underscored by the records of the cases now before us. A single example will suffice to illustrate the point.

In No. 12, *Price* v. *United States*, the petitioner refused to answer a number of questions put to him by the Inter-

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too obscene or indecent to be spread upon the records of the court." Under *Roth* v. *United States*, 354 U. S. 476, 488–489, the issue dealt with in *Rosen* would presumably no longer arise.

[13] *United States* v. *Lamont*, 236 F. 2d 312; *Meer* v. *United States*, 235 F. 2d 65; *Babb* v. *United States*, 218 F. 2d 538; *United States* v. *Simplot*, 192 F. Supp. 734; *United States* v. *Devine's Milk Laboratories, Inc.*, 179 F. Supp. 799; *United States* v. *Apex Distributing Co.*, 148 F. Supp. 365.

nal Security Subcommittee of the Senate Judiciary Committee. At the beginning of the hearing in question, the Chairman and other subcommittee members made widely meandering statements purporting to identify the subject under inquiry. It was said that the hearings were "not . . . an attack upon the free press," that the investigation was of "such attempt as may be disclosed on the part of the Communist Party . . . to influence or to subvert the American press." It was also said that "We are simply investigating communism wherever we find it." In dealing with a witness who testified shortly before Price, counsel for the subcommittee emphatically denied that it was the subcommittee's purpose "to investigate Communist infiltration of the press and other forms of communication." But when Price was called to testify before the subcommittee no one offered even to attempt to inform him of what subject the subcommittee did have under inquiry. At the trial the Government took the position that the subject under inquiry had been Communist activities generally. The district judge before whom the case was tried found that "the questions put were pertinent to the matter under inquiry" without indicating what he thought the subject under inquiry was. The Court of Appeals, in affirming the conviction, likewise omitted to state what it thought the subject under inquiry had been. In this Court the Government contends that the subject under inquiry at the time the petitioner was called to testify was "Communist activity in news media." [14]

It is difficult to imagine a case in which an indictment's insufficiency resulted so clearly in the indictment's failure to fulfill its primary office—to inform the defendant of the nature of the accusation against him. Price refused to answer some questions of a Senate subcommittee. He

[14] Brief for the United States, p. 26.

was not told at the time what subject the subcommittee was investigating. The prior record of the subcommittee hearings, with which Price may or may not have been familiar, gave a completely confused and inconsistent account of what, if anything, that subject was. Price was put to trial and convicted upon an indictment which did not even purport to inform him in any way of the identity of the topic under subcommittee inquiry. At every stage in the ensuing criminal proceeding Price was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal. Yet Price could be guilty of no criminal offense unless the questions he refused to answer were in fact pertinent to a specific topic under subcommittee inquiry at the time he was interrogated. *Sinclair* v. *United States*, 279 U. S. 263, at 292.

It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out "the specific offence coming under the general description," with which the defendant is charged. This purpose, as defined in *United States* v. *Cruikshank*, 92 U. S. 542, 558, is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." [15] This criterion is of the greatest relevance

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[15] This principle enunciated in *Cruikshank* retains undiminished vitality, as several recent cases attest. "Another reason, [for the requirement that every ingredient of the offense charged must be clearly and accurately alleged in the indictment] and one sometimes overlooked, is to enable the court to decide whether the facts alleged are sufficient in law to withstand a motion to dismiss the indictment or to support a conviction in the event that one should be had." *United States* v. *Lamont*, 18 F. R. D. 27, 31. "In addition to inform-

here, in the light of the difficulties and uncertainties with which the federal trial and reviewing courts have had to deal in cases arising under 2 U. S. C. § 192, to which reference has already been made. See, *e. g.*, *Watkins* v. *United States*, 354 U. S. 178; *Deutch* v. *United States*, 367 U. S. 456. Viewed in this context, the rule is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task. Cf. *Watkins* v. *United States*, *supra*.

It is argued that any deficiency in the indictments in these cases could have been cured by bills of particulars.[16]

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ing the defendant, another purpose served by the indictment is to inform the trial judge what the case involves, so that, as he presides and is called upon to make rulings of all sorts, he may be able to do so intelligently." Puttkammer, Administration of Criminal Law, 125–126. See *Flying Eagle Publications, Inc.*, v. *United States*, 273 F. 2d 799; *United States* v. *Goldberg*, 225 F. 2d 180; *United States* v. *Silverman*, 129 F. Supp. 496; *United States* v. *Richman*, 190 F. Supp. 889; *United States* v. *Callanan*, 113 F. Supp. 766. See 4 Anderson, Wharton's Criminal Law and Procedure, 506; Orfield, Indictment and Information in Federal Criminal Procedure, 13 Syracuse L. Rev. 389, 392. See also Orfield, Criminal Procedure from Arrest to Appeal, 226–230.

[16] In No. 128, *Gojack* v. *United States*, the petitioner filed a timely motion for a bill of particulars, requesting that he be informed of the question under subcommittee inquiry. The motion was denied.

In No. 9, *Shelton* v. *United States*, the petitioner filed a similar motion. The motion was granted, and the Government responded orally as follows:

"As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.

"This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution."

In the four other cases no motions for bills of particulars were filed.

But it is a settled rule that a bill of particulars cannot save an invalid indictment. See *United States* v. *Norris*, 281 U. S. 619, 622; *United States* v. *Lattimore*, 215 F. 2d 847; *Babb* v. *United States*, 218 F. 2d 538; *Steiner* v. *United States*, 229 F. 2d 745; *United States* v. *Dierker*, 164 F. Supp. 304; 4 Anderson, Wharton's Criminal Law and Procedure, § 1870. When Congress provided that no one could be prosecuted under 2 U. S. C. § 192, except upon an indictment, Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry. A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. See Orfield, Criminal Procedure from Arrest to Appeal, 243.

This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. *Ex parte Bain*, 121 U. S. 1; *United States* v. *Norris*, 281 U. S. 619; *Stirone* v. *United States*, 361 U. S. 212. "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a pris-

oner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." *Ex parte Bain, supra,* at 10, 13. We reaffirmed this rule only recently, pointing out that "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States, supra,* at 218.[17]

For these reasons we conclude that an indictment under 2 U. S. C. § 192 must state the question under congressional committee inquiry as found by the grand jury.[18]

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[17] See also *Smith* v. *United States,* 360 U. S. 1, 13 (dissenting opinion); Comment, 35 Mich. L. Rev. 456.

[18] The federal perjury statute, 18 U. S. C. § 1621, makes it a crime for a person under oath willfully to state or subscribe to "any material matter which he does not believe to be true." The Government, pointing to the analogy between the perjury materiality requirement and the pertinency requirement in 2 U. S. C. § 192 recognized in *Sinclair* v. *United States,* 279 U. S. 263, 298, contends that the present cases are controlled by *Markham* v. *United States,* 160 U. S. 319, where the Court sustained a perjury indictment. But *Markham* is inapposite. The analogy between the perjury statute and 2 U. S. C. § 192, while persuasive for some purposes, is not persuasive here, for the determination of the subject under inquiry does not play the cen-

Only then can the federal courts responsibly carry out the duty which Congress imposed upon them more than a century ago:

> "The question must be pertinent to the subject-matter, and that will have to be decided by the courts of justice on the indictment." [19]

Reversed.

MR. JUSTICE FRANKFURTER took no part in the decision of these cases.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

MR. JUSTICE BRENNAN took no part in the consideration or decision of No. 10, *Alden Whitman, Petitioner,* v. *United States.*

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tral role in a perjury prosecution which it plays under 2 U. S. C. § 192. But even were the analogy perfect *Markham* would still not control, for it holds only that a perjury indictment need not set forth how and why the statements were allegedly material. The Court carefully pointed out that the indictment did in fact reveal the subject under inquiry, stating that "as [the fourth count of indictment] charged that such statement was material to an inquiry pending before, and within the jurisdiction of, the Commissioner of Pensions; *and* as the fair import of that count was that the inquiry before the Commissioner had reference to a claim made by the accused under the pension laws, on account of personal injuries received while he was a soldier, and made it necessary to ascertain whether the accused had, since the war or after his discharge from the army, received an injury to the forefinger of his right hand, we think that the fourth count, although unskilfully drawn, sufficiently informed the accused of the matter for which he was indicted, and, therefore, met the requirement that it should set forth the substance of the charge against him." 160 U. S., at 325–326. (Emphasis added.) This has been equally true of other perjury indictments sustained by the Court. See *Hendricks* v. *United States*, 223 U. S. 178; *United States* v. *Debrow*, 346 U. S. 374 (the indictment in *Debrow* is set forth in the opinion of the Court of Appeals, 203 F. 2d 699, 702, n. 1).

[19] See p. 7, *supra*.

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Nos. 8, 9, 10, 11 AND 12.—OCTOBER TERM, 1961.

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Robert Shelton, Petitioner, v. United States.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
Alden Whitman, Petitioner, v. United States.	
Herman Liveright, Petitioner, v. United States.	
William A. Price, Petitioner, v. United States.	

[May 21, 1962.]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I think it is desirable to point out that in a majority of the six cases that we dispose of today no indictment, however drawn, could in my view be sustained under the requirements of the First Amendment.

The investigation was concededly an investigation of the press. This was clearly brought out by the record in *Shelton*, wherein the following colloquy was alleged to have taken place at the commencement of the Subcommittee hearings:

"Senator HENNINGS. On the same subject matter. I do believe it is very important at the outset for us

to make it abundantly clear, if that is the purpose of counsel, and if it is the purpose of this committee, that this is not in any sense an attack upon the free press of the United States.

"The CHAIRMAN. Why, certainly, that is true.

"Senator HENNINGS. And I think, too, that it should be clear that the best evidence of any subversion or infiltration into any news-dispensing agency or opinion-forming journal is certainly the product itself.

"The CHAIRMAN. That is correct.

"Senator HENNINGS. Of course, the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency.

"The CHAIRMAN. Correct.

"Senator HENNINGS. But I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings—that it be generally known and understood that this is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

"And I do think that at some later time, perhaps, it might be appropriate for executives of some of the newspapers under inquiry, whose employees are under inquiry, to be called and to testify and for them to show, if they can show, that the end product, the newspaper itself, has not been influenced by these efforts.

"The CHAIRMAN. The Chair thinks that is a very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety.

"We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it,* and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

"Senator HENNINGS. Thank you, Mr. Chairman.

"Senator WATKINS. I would like to say I agree with Senator Hennings' statement, Mr. Chairman." R. 72–73.

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*The Subcommittee in its Report to the Senate Judiciary Committee, S. Rep. No. 131, 85th Cong., 1st Sess., p. 95, stated:

"The Communists in the United States have their own daily newspaper, the Daily Worker, and control various weekly and monthly periodicals, including Political Affairs and Masses and Mainstream. But those publications are so brasenly slanted that their propaganda value, except for certain elements of the foreign language press in this country, is sharply limited (pts. 28 and 29).

"In order to overcome this disadvantage, and for other reasons, Communists have made vigorous and sustained efforts to infiltrate the American press and radio and to entrench their members in all other forms of mass communications, where, by emphasis or omission of the written or spoken word, it may be turned to the advantage of the conspiracy."

The Report referred to the ruling of an arbiter in a case where a paper had discharged a "rewrite man" because he invoked the Fifth Amendment. It said that the following quotations from his opinion were "of more than passing interest."

"A metropolitan newspaper in America today is more than a mirror to the happenings of the day. It is a moulder of public opinion; capable of leading crusades; capable of introducing new ideas; capable of propagating truth or propaganda as it wills. By its very nature, whether it would abdicate or not, a newspaper maintains a position of leadership and responsibility in this cold war that is vital to our national security. Other industries (atomic energy, defense,

The New York Times was a prime target of the investigation, 30 of the 38 witnesses called at the 1955 executive session and 15 of the 18 called at the 1956 public hearings being present or past employees of that paper.

The power to investigate is limited to a valid legislative function. Inquiry is precluded where the matter investigated is one on which "no valid legislation" can be enacted. *Kilbourn* v. *Thompson*, 103 U. S. 168, 195. Since the First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press," this present investigation was plainly unconstitutional. As we said in *Watkins* v. *United States*, 354 U. S. 178, 197:

> "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is now a law, nevertheless an investigation is part of law-making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

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et cetera) may be more vital but this fact does not impair the vital role of our press.

"Each worker performs his task in life with tools, and these tools run the gamut from an ax to a zither. The rewrite man has his tools, too. They are words. Words but express ideas and so it follows that the rewrite man works all day with ideas. This is a war of ideas. Can his position then be deemed nonsensitive? A rewrite man can select the facts he considers important as relayed to him by the reporter in the field. His is the choice of the topic sentence and the lead paragraph. His selection of words sets the tone of the article and influences, too, the choice of headline. The conclusion is irresistible that a rewrite man occupies a sensitive position on a newspaper." *Id.*, at 97.

The Committee concluded, "Communists have infiltrated mass communications media in the United States, and efforts to increase such infiltration continue." *Id.*, at 117.

Under our system of government, I do not see how it is possible for Congress to pass a law saying whom a newspaper or news agency or magazine shall or shall not employ. If this power exists, it can reach the rightist as well as the leftist press, as *United States* v. *Rumely*, 345 U. S. 41, shows. Whether it is used against the one or the other will depend on the mood of the day. Whenever it is used to ferret out the ideology of those collecting news or writing articles or editorials for the press, it is used unconstitutionally. The theory of our Free Society is that government must be neutral when it comes to the press—whether it be rightist or leftist, orthodox or unorthodox. The theory is that in a community where men's minds are free, all shades of opinion must be immune from governmental inquiry lest we end with regimentation. Congress has no more authority in the field of the press than it does where the pulpit is involved. Since the editorials written and the news printed and the policies advocated by the press are none of the Government's business, I see no justification for the Government investigating the capacities, leanings, ideology, qualifications, prejudices or politics of those who collect or write the news. It was conceded on oral argument that Congress would have no power to establish standards of fitness for those who work for the press. It was also conceded that Congress would have no power to prescribe loyalty tests for people who work for the press. Since this investigation can have no legislative basis as far as the press is concerned, what then is its constitutional foundation?

It is said that Congress has the power to determine the extent of Communist infiltration so that it can know how much tighter the "security" laws should be made. This proves too much. It would give Congress a roving power to inquire into fields in which it could not legislate. If Congress can investigate the press to find out

if Communists have infiltrated it, it could also investigate the churches for the same reason. Are the pulpits being used to promote the Communist cause? Were any of the clergy ever members of the Communist Party? How about the governing board? How about those who assist the pastor and perhaps help prepare his sermons or do the research? Who comes to the confession and discloses that he or she once was a Communist?

There is a dictum in *United States* v. *Rumely*, 345 U. S. 41, 43, that the reach of the investigative power of Congress is measured by the "informing function of Congress," a phrase taken from Woodrow Wilson's Congressional Government (1885), p. 303. But the quotation from Wilson was mutilated, because the sentences which followed his statement that "The informing function of Congress should be preferred even to its legislative function" were omitted from the *Rumely* opinion. Those omitted sentences make abundantly clear that Wilson was speaking, not of a congressional inquiry roaming at large but of one that inquired into and discussed the functions and operations of government. Wilson said:

> "The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes the demands of public opinion." *Id.*, at 303–304.

The power to inform is, in my view, no broader than the power to legislate.

Congress has no power to legislate either on "religion" or on the "press." If an editor or a minister violates the law, he can be prosecuted. But the investigative power, as I read our Constitution, is barred from certain areas by the First Amendment. If we took the step urged by the prosecution, we would allow Congress to enter the forbidden domain.

The strength of the "press" and the "church" is in their freedom. If they pervert or misuse their power, informed opinion will in time render the verdict against them. A paper or pulpit might conceivably become a mouthpiece for Communist ideology. That is typical of the risks a Free Society runs. The alternative is governmental oversight, governmental investigation, governmental questioning, governmental harassment, governmental exposure for exposure's sake. Once we crossed that line, we would sacrifice the values of a free society for one that has a totalitarian cast.

Some think a certain leeway is necessary or desirable, leaving it to the judiciary to curb what judges may from time to time think are excessive practices. Thus, a judge with a professorial background may put the classroom in a preferred position. One with a background of a prosecutor dealing with "subversives" may be less tolerant. When a subjective standard is introduced, the line between constitutional and unconstitutional conduct becomes vague, uncertain, and unpredictable. The rationalization, of course, reduces itself ultimately to the idea that "the judges know best." My idea is and has been that those who put the words of the First Amendment in the form of a command knew best. That is the political theory of government we must sustain until a constitutional amendment is adopted that puts the Congress astride the "press."

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Norton Anthony Russell, Petitioner, 8 v. United States.	
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Alden Whitman, Petitioner, 10 v. United States.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
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William A. Price, Petitioner, 12 v. United States.	
John T. Gojack, Petitioner, 128 v. United States.	

[May 21, 1962.]

MR. JUSTICE CLARK, dissenting.

Although I have joined Brother HARLAN in dissenting on the grounds ably expressed in his opinion, the Court today so abruptly breaks with the past that I must visually add my voice in protest. The statute under which these cases were prosecuted, 2 U. S. C. § 192, was originally passed 105 years ago. Case after case has come

here during that period. Still the Court is unable to point to one case—not one—in which there is the remotest suggestion that indictments thereunder must include any of the underlying facts necessary to evaluate the propriety of the unanswered questions. Following the universal art and practice, indictments under this statute have commonly phrased the element of pertinency in the statutory language, *i. e.*, the unanswered question was "pertinent to the question under inquiry." This Court in *Sacher* v. *United States*, 356 U. S. 576 (1958), had an opportunity to put a stop to this widespread practice but instead reversed on other, rather unsubstantial grounds without even acknowledging that numerous defendants were being denied "one of the significant protections which the guaranty of a grand jury indictment was intended to confer." In requiring these indictments to "identify the subject which was under inquiry at the time of the defendant's alleged default or refusal to answer," the Court has concocted a new and novel doctrine to upset congressional contempt convictions. A rule has been sown which, as pointed out by Brother HARLAN, has no seeds in general indictment law and which will reap no real benefits in congressional contempt cases. If knowing the subject matter under investigation is actually important to these recalcitrant witnesses, they can utilize the right recognized in *Watkins* of demanding enlightment from the questioning body or the time-honored practice of requesting a bill of particulars from the prosecutor. Let us hope that the reasoning of the Court today does not apply to indictments under other criminal statutes, for if it does an uncountable number of indictments will be invalidated. If, however, the rule is only cast at congressional contempt cases, it is manifestly unjust.

By fastening upon indictment forms under § 192 its superficial luminosity requirement the Court creates additional hasards to the successful prosecution of congres-

sional contempt cases, which impair the informing procedures of the Congress by encouraging contumacy before its committees. It was only five years ago in my dissenting opinion in *Watkins* that I indicated the rule in that case might "well lead to trial of all contempt cases before the bar . . ." of the House of Congress affected. *Watkins* v. *United States*, 354 U. S. 178, 225 (1957). In that short period the Court has now upset 10 convictions under § 192. This continued frustration of the Congress in the use of the judicial process to punish those who are contemptuous of its committees indicates to me that the time may have come for Congress to revert to "its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House [affected]." *Id.*, at 206. Perhaps some simplified method may be found to handle such matters without consuming too much of the time of the full House involved. True a recalcitrant witness would have to be released at the date of adjournment, but at least contumacious conduct would then receive some punishment. The dignity of the legislative process deserves at least that much sanction.

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[May 21, 1962.]

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

The ground rules for testing the sufficiency of an indictment are twofold: (1) does the indictment adequately inform the defendant of the nature of the charge he will have to meet; (2) if the defendant is convicted, and later

prosecuted again, will a court, under what has been charged, be able to determine the extent to which the defense of double jeopardy is available? *United States* v. *Debrow*, 346 U. S. 374.

Rule 7 (c) of the Federal Rules of Criminal Procedure, effective in 1946, was of course not intended to abrogate or weaken either of these yardsticks. Its purpose simply was to do away with the subtleties and uncertainties that had characterized criminal pleading at common law. The rule provides in pertinent part:

> "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain . . . any other matter not necessary to such statement."

The rule was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *Debrow*, at 376.

An essential element of the offense established by 2 U. S. C. § 192[1] is that the questions which the defendant refused to answer were "pertinent to the question under inquiry" before the inquiring congressional committee. Each of the indictments in these cases charged this element of the offense in the language of the statute, following the practice consistently employed since 1950 in the

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[1] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer *any question pertinent to the question under inquiry*, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." (Emphasis added.)

District of Columbia, where most of the § 192 cases have been brought.[2] The Court now holds, however, that without a statement of the actual subject under inquiry,

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[2] [The following abbreviations have been used to indicate where the indictment may be found: TR, the transcript of the record in this Court; JA, the joint appendix in the Court of Appeals; Cr. No. —, the docket number in the District Court.] See *Grumman* v. *United States*, 368 U. S. 925 (TR, p. 2); *Silber* v. *United States*, 368 U. S. 925 (TR, p. 2); *Hutcheson* v. *United States*, 369 U. S. — (TR, p. 4); *Deutch* v. *United States*, 367 U. S. 456 (TR, p. 7); *Barenblatt* v. *United States*, 360 U. S. 109 (TR, p. 1); *Flazer* v. *United States*, 358 U. S. 147 (TR, p. 2); *Sacher* v. *United States*, 356 U. S. 576 (JA, p. 2); *Watkins* v. *United States*, 354 U. S. 178 (TR, p. 2); *Bart* v. *United States*, 349 U. S. 219 (TR, p. 108); *Emspak* v. *United States*, 349 U. S. 190 (TR, p. 4); *Quinn* v. *United States*, 349 U. S. 155 (TR, p. 3); *United States* v. *Rumely*, 345 U. S. 41 (TR, pp. 2–4); *Knowles* v. *United States*, 108 U. S. App. D. C. 148, 280 F. 2d 696 (Cr. No. 1211–56); *Watson* v. *United States*, 108 U. S. App. D. C. 141, 280 F. 2d 689 (Cr. No. 1151–54); *Miller* v. *United States*, 104 U. S. App. D. C. 30, 259 F. 2d 187 (Cr. No. 164–57); *LaPoma* v. *United States*, 103 U. S. App. D. C. 151, 255 F. 2d 903 (Cr. No. 290–57); *Brewster* v. *United States*, 103 U. S. App. D. C. 147, 255 F. 2d 899 (Cr. No. 289–57); *Singer* v. *United States*, 100 U. S. App. D. C. 260, 244 F. 2d 349 (Cr. No. 1150–54); *O'Connor* v. *United States*, 240 F. 2d 404 (Cr. No. 1650–53); *Keeney* v. *United States*, 94 U. S. App. D. C. 366, 218 F. 2d 843 (Cr. No. 870–52); *Bowers* v. *United States*, 92 U. S. App. D. C. 79, 202 F. 2d 447 (Cr. No. 1252–51); *Kamp* v. *United States*, 84 U. S. App. D. C. 187, 176 F. 2d 618 (Cr. No. 1788–50); *United States* v. *Peck*, 149 F. Supp. 238 (Cr. No. 1214–56); *United States* v. *Hoag*, 142 F. Supp. 667 (Cr. No. 574–55); *United States* v. *Fischetti*, 103 F. Supp. 796 (Cr. No. 1254–51); *United States* v. *Nelson*, 103 F. Supp. 215 (Cr. No. 1796–50); *United States* v. *Jaffe*, 98 F. Supp. 191 (Cr. No. 1786–50); *United States* v. *Raley*, 96 F. Supp. 495 (Cr. No. 1748–50); *United States* v. *Fitzpatrick*, 96 F. Supp. 491 (Cr. No. 1743–50).

For a short period after Rule 7 (c), Fed. Rules Crim. Proc., came into effect in 1946, vestiges of common-law pleading continue to be found in some, but not all, § 192 indictments. Compare *Fleischman* v. *United States*, 339 U. S. 349 (TR, pp. 2–3), with *United States* v. *Bryan*, 339 U. S. 323 (TR, p. 2A). By 1950, however, all such indictments had come to be in statutory form.

this allegation was inadequate to satisfy the "apprisal" requisite of a valid indictment. At the same time the allegation is found sufficient to satisfy the "jeopardy" requisite.

The Court's holding is contrary to the uniform course of decisions in the lower federal courts. The Court of Appeals for the District of Columbia, sitting first as a panel and later *en banc*, has upheld "pertinency" allegations which, like the present indictment, did not identify the particular subject being investigated. *Barenblatt* v. *United States*, 240 F. 2d 875 (panel); *Sacher* v. *United States*, 252 F. 2d 828 (*en banc*).[3] The Court of Appeals for the Second Circuit is of the same view. *United States* v. *Josephson*, 165 F. 2d 82;[4] *United States* v. *Lamont*, 236 F. 2d 312.[5] And so, quite evidently, is the Court of

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[3] Four judges dissented on other grounds.

[4] The record on appeal shows that one of the grounds of attack was the indictment's failure to allege "the nature of any matter under inquiry before said Committee." Record on Appeal in the Court of Appeals for the Second Circuit, No. 91, Doc. 20790, p. 7.

[5] This case evinces no purpose to depart from *Josephson*. The District Court, although dismissing the indictment on other grounds, quite evidently found the statutory "pertinency" allegation sufficient. 18 F. R. D., at 30, 37. And in affirming, the Court of Appeals, citing to the *Josephson* case among others, stated that "the result might well be different" had the authority of the investigating committee appeared in the indictment. 236 F. 2d, at 316 (note 6), 317. (The committee in *Lamont* was a Subcommittee of the Senate Committee on Government Operations whose enabling legislation the court found did not authorize investigation of "subversive activities.") As regards the issue decided in the present cases, the following observations by Chief Judge Clark, who speaks with special authority in procedural matters, are significant (*id.*, at 317):

"Pleading, either civil or criminal, should be a practical thing. Its purpose is to convey information succinctly and concisely. In older days the tendency was to defeat this purpose by overelaboration and formalism. Now we should avoid the opposite trend, but of like consequence, that of a formalism of generality. *There seems to be some tendency to confuse general pleadings with entire absence of*

Appeals for the Fifth Circuit. *Braden* v. *United States*, 272 F. 2d 653.[6] No Court of Appeals has held otherwise. And nothing in this Court's more recent cases could possibly be taken as foreshadowing the decision made today.[7]

The reasons given by the Court for its sudden holding, which unless confined to contempt of Congress cases bids fair to throw the federal courts back to an era of criminal pleading from which it was thought they had finally emerged, are novel and unconvincing.

I.

It is first argued that an allegation of "pertinency" in the statutory terms will not do, because that element is at "the very core of criminality" under § 192. This is said to follow from what "our cases have uniformly held." *Ante*, p. —. I do not so understand the cases on which the Court relies. It will suffice to examine the three cases from which quotations have been culled. *Ante*, pp. —, —.

United States v. *Cruikshank*, 92 U. S. 542, involved an indictment under the Enforcement Act of 1870 (16

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statement of claim or charge. [Footnote omitted.] But this is a mistake, for general pleadings, far from omitting a claim or charge, do convey information to the intelligent and sophisticated circle for which they are designed. Thus the charge that at a certain time and place 'John Dow with premeditation shot and murdered John Roe,' F.R.Cr.P., Form 2, even though of comparatively few words, has made clear the *offense it is bringing before the court*. [Footnote omitted.] The present indictments, however, do not show the basis upon which eventual conviction can be had; rather, read in the light of the background of facts and Congressional action, they show that conviction cannot be had." (Emphasis supplied.)

[6] That case was concerned with the "connective reasoning" aspect of "pertinency," *Watkins* v. *United States*, 354 U. S. 178, 214–215, rather than the "subject under inquiry" aspect; but it is not perceived how this can be thought to make a difference in principle.

[7] This is not the first opportunity the Court has had to consider the matter. *Ante*, p. —, note 7.

Stat. 140) making it a felony to conspire to prevent any person from exercising and enjoying "any right or privilege granted or secured to him by the constitution or laws of the United States." Most of the counts were dismissed on the ground that they stated no federal offense whatever. The remainder were held inadequate from the standpoint of "appraisal," in that they simply alleged a conspiracy to prevent certain citizens from enjoying rights "granted and secured to them by the constitution and laws of the United States," such rights not being otherwise described or identified. Small wonder that these opaque allegations drew from the Court the comment that the indictment "'must descend to particulars.'" *Id.*, at 558. Indeed, the Court observed: "According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, *but whether the offence has here been described at all.*" *Id.*, at 557. (Emphasis supplied.)

United States v. *Simmons*, 96 U. S. 360, was concerned with an indictment involving illegal distilling. Revised Statutes 3266 made it an offense to distill spirits on premises where vinegar "is" manufactured. One count of the indictment charged the defendant with causing equipment on premises where vinegar "was" manufactured to be used for distilling. This count was dismissed for its failure (1) to identify the person who had so used the equipment or to allege that his identity was unknown to the grand jurors; and (2) to allege that the distilling and manufacture of vinegar were coincidental, as required by the statute.[8] What is more significant from the stand-

[8] The Court stated (*id.*, at 362):
"Where the offence is purely statutory . . . it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the

point of the present cases is that in sustaining another count of the indictment charging the defendant with engaging in the business of distilling "with the intent to defraud the United States of the tax" on the spirits (R. S. § 3281), the Court held that it was not necessary to allege "the particular means by which the United States was to be defrauded of the tax." *Id.*, at 364.

United States v. *Carll*, 105 U. S. 611, held no more than that an indictment charging forgery was insufficient for failure to allege *scienter*, which, though not expressly required by the statute, the Court found to be a necessary element of the crime. Hence a charge in the statutory language would not suffice. Section 192 of course contains no such gap in its provisions. What the Court now requires of these indictments under § 192 involves not the supplying of a missing element of the crime, but the addition of the particulars of an element already clearly alleged.

To me it seems quite clear that even under these cases, decided long before Rule 7 (c) came into being, the "pertinency" allegations of the present indictments would have been deemed sufficient. Other early cases indicate the same thing. See, *e. g.*, *United States* v. *Mills*, 7 Pet. 138, 142; *Evans* v. *United States*, 153 U. S. 584, 587; [9]

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statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc., sect. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with *reasonable certainty*, of the *nature* of the accusation against him . . . . An indictment not so framed is defective, although it may follow the language of the statute." (Emphasis supplied.)

[9] The *Mills* and *Evans* cases suggest that a more lenient rule of pleading applies in misdemeanor than in felony cases. Although that distinction seems to have disappeared in the later cases, it may be noted that § 192 in terms makes this offense a misdemeanor. Note 1, *supra*.

Markham v. *United States*, 160 U. S. 319, 325; [10] *Bartell* v. *United States*, 227 U. S. 427, 433–434.[11] I think there can be no doubt about the matter after Rule 7 (c).

In *United States* v. *Debrow*, *supra*, the Court in reversing the dismissal of perjury indictments which had gone

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[10] In that case the Court spoke, doubtless by way of dictum, concerning the method of pleading "materiality" in a perjury indictment (an element akin to "pertinency" under § 192, *Sinclair* v. *United States*, 279 U. S. 263, 298):

"It was not necessary that the indictment should set forth all the details or facts involved in the issue as to materiality of [the false] statement . . . . In 2 Chittey's Criminal Law, 307, the author says: 'It is undoubtedly necessary that it should appear on the face of the indictment that the false allegations were material to the matter in issue. But it is not requisite to set forth all the circumstances which render them material; the simple averment that they were so, will suffice.' In *King* v. *Dowlin* . . . Lord Kenyon said that it had always been adjudged to be sufficient in an indictment for perjury, to allege generally that the particular question become a material question. . . ." 160 U. S., at 325.

[11] There, under an exception, prevailing in "obscenity" cases, to the then general rule that in "documentary" crimes the contents of the document must be set forth in the indictment, the Court in sustaining an indictment charging the unlawful mailing of an "indecent" letter, only generally described, said (*id.*, at 433–434):

"The present indictment specifically charged that the accused had knowingly violated the laws of the United States by depositing on a day named, in the post-office specifically named, a letter of such indecent character as to render it unfit to be set forth in detail, enclosed in an envelope bearing a definite address. In the absence of a demand for a bill of particulars we think this description sufficiently advised the accused of the nature and cause of the accusation against him. This fact is made more evident when it is found that this record shows no surprise to the accused in the production of the letter at the trial . . . ."

The Court suggests that *Bartell* and *Rosen* v. *United States* (*infra*, p. —) are inapposite because of the special rule of pleading applicable in "obscenity" cases. *Ante*, —. However, considering that the "apprisal" requisite of an indictment arises from constitutional requirements, this factor far from lessening the weight of these two cases adds to their authority.

on the ground that they had not alleged the name or authority of the persons administering the oath, said (346 U. S., at 376–379):

> "The Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure.
>
> . . . . .
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> "The charges of the indictments followed substantially the wording of the statute, which embodies all the elements of the crime, and such charges clearly informed the defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. *The sufficiency of the indictment is not a question of whether it could have been more definite and certain.* If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars. Rule 7 (f), F.R. Crim. Proc." (Emphasis supplied.)

It is likewise "inconceivable" to me how the indictments in the present cases can be deemed insufficient to advise these petitioners of the nature of the charge they would have to meet. The indictments gave them the name of the committee before which they had appeared; the place and the dates of their appearances; the references to the enabling legislation under which the committee acted; and the questions which the petitioners refused to answer. The subject matter of the investigations had been stated to the petitioners at the time of their appearances before the committees. And the com-

mittee transcripts of the hearings were presumably in their possession and, if not, were of course available to them.

Granting all that the Court says about the crucial character of pertinency as an element of this offense, it is surely not more so than the element of premeditation in the crime of first degree murder. If from the standpoint of "appraisal" it is necessary to particularize "pertinency" in a § 192 indictment, it should follow, *d fortiori*, that, contrary to what is prescribed in Forms 1 and 2 of the Federal Rules of Criminal Procedure, a first degree murder indictment should particularize "premeditation."

II.

The Court says that its holding is needed to prevent the Government from switching on appeal, to the prejudice of the defendants, to a different theory of pertinency from that on which the conviction may have rested. *Ante*, pp. ——, ——. There are several good answers to this.

To the extent that this fear relates to the subject under investigation, the Government cannot of course travel outside the confines of the trial record, of which the defendant has full knowledge. If what is meant is that the Government may not modify on appeal its "trial" view of the "connective reasoning" (*supra*, p. ——, note 6) relied on to establish the germaneness of the questions asked to the subject matter of the inquiry, surely it would be free to do so, this aspect of pertinency being simply a matter of law, *Sinclair* v. *United States*, 279 U. S. 263, 299. Moreover the Court does not find these indictments deficient because they failed to allege the "connective reasoning."

Beyond these considerations, a defendant has ample means for protecting himself in this regard. By objecting at the committee hearing to the pertinency of any question asked him he may "freeze" this issue, since the Govern-

ment's case on this score must then stand or fall on the pertinency explanation given by the committee in response to such an objection. *Deutch* v. *United States*, 367 U. S. 456, 472–473 (dissenting opinion); cf. *Watkins* v. *United States*, *supra*, at 214–215; *Barenblatt* v. *United States*, 360 U. S. 109, 123–125. If he has failed to make a pertinency objection at the committee hearing, thereby leaving the issue "at large" for the trial (*Deutch*, *ibid.*), he may still seek a particularization through a bill of particulars. Cf. *United States* v. *Kamin*, 136 F. Supp. 791, 795 n. 4.

It should be noted that no pertinency objection was made by any of these petitioners at the committee hearings. Further, no motions for a bill of particulars were made in No. 12, *Price*, to which the Court especially addresses itself (*ante*, pp. ——, ——), or in No. 8, *Russell*, No. 10, *Whitman*, and No. 11, *Liveright*. In No. 9, *Shelton*, and No. 128, *Gojack*, such motions were made. However, no appeal was taken from the denial of the motion in *Gojack*, and in *Shelton* the sufficiency of the particulars furnished by the Government was not questioned either by a motion for a further bill or on appeal.

III.

Referring to certain language in the *Cruikshank* case, *supra*, the Court suggests that the present holding is supported by a further "important corollary purpose" which an indictment is intended to serve: to make "it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." *Ante*, pp. ——.

But whether or not the Government has established its case on "pertinency" is something that must be determined on the record made at the trial, not upon the allegations of the indictment. There is no such thing as a motion for summary judgment in a criminal case. While

appellate courts might be spared some of the tedium of going through these § 192 records were the allegations of indictments to spell out the "pertinency" facts, the Court elsewhere in its opinion recognizes that the issue at hand can hardly be judged in terms of whether fuller indictments "would simplify the courts' task." *Ante*, p. —.

The broad language in *Cruikshank* on which the Court relies cannot properly be taken as meaning more than that an indictment must set forth enough to enable a court to determine whether a criminal offense over which the court has jurisdiction has been alleged. Cf. McClintock, Indictment by Grand Jury, 26 Minn. L. Rev. 153, 159–160 (1942); Orfield, Criminal Procedures from Arrest to Appeal, 222–226, 227 n. 107.[12] Certainly the allegations of these indictments meet such requirements.

IV.

The final point made by the Court is perhaps the most novel of all. It is said that a statement of the subject under inquiry is necessary in the indictment in order to fend against the possibility that a defendant may be convicted on a theory of pertinency based upon a subject under investigation different from that which may have been found by the grand jury. An argument similar to this was rejected by this Court many years ago in *Rosen* v. *United States*, 161 U. S. 29, 34, where an indictment charging the defendant with mailing obscene matter, only generally described, was upheld over strong dissent (*id.*, at 45–51) asserting that the accused was entitled to know the particular parts of the material which the grand jury had deemed obscene.[13]

[12] The other cases and commentaries referred to by the Court in Note 15, *ante*, p. —, indicate nothing different.

[13] It seems clear that the Court proceeded on the premise that the "isolated excerpt" rule of *Regina* v. *Hicklin*, [1868] L. R. 3 Q. B. 360,

This proposition is also certainly unsound on principle. In the last analysis it would mean that a prosecutor could not safely introduce or advocate at a trial evidence or theories, however relevant to the crime charged in the indictment, which he had not presented to the grand jury. Such cases as *Ex parte Bain*, 121 U. S. 1, *United States* v. *Norris*, 281 U. S. 619, and *Stirone* v. *United States*, 361 U. S. 212, lend no support to the Court's thesis. They held only that, consistently with the Fifth Amendment, a trial judge could not amend the indictment itself, either by striking or adding material language, or, amounting to the latter, by permitting a conviction on evidence or theories not fairly embraced in the charges made in the indictment. To allow this would in effect permit a defendant to be put to trial upon an indictment found not by a grand jury but by a judge.[14]

If the Court's reasoning in this part of its opinion is sound, I can see no escape from the conclusion that a defendant convicted on a lesser included offense, not alleged by the grand jury in an indictment for the greater offense, would have a good plea in arrest of judgment. (Fed. Rules Crim. Proc., 34.)

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recently rejected in *Roth* v. *United States*, 354 U. S. 476, 488–489, in favor of the "whole book" rule, obtained, for the Court relied on *United States* v. *Bennett*, 24 Fed. Cas. 1093 (16 Blatchford, 338) where the "excerpt" test was applied.

[14] While the "connective reasoning" aspect of "pertinency" is again evidently not involved in the Court's reasoning, it is appropriate to note that it is scarcely realistic to consider that issue of law as one on which the grand jury has exercised an independent judgment in determining whether an indictment should be returned. For that body may be expected, quite naturally and properly, to follow the District Attorney's advice on this score, as with any other matter of law. That the legal premises on which the grand jury acted in this respect may turn out to have been wrong could hardly vitiate the indictment itself.

In conclusion, I realize that one in dissent is sometimes prone to overdraw the impact of a decision with which he does not agree. Yet I am unable to rid myself of the view that the reversal of these convictions on such insubstantial grounds will serve to encourage recalcitrance to legitimate congressional inquiry, stemming from the belief that a refusal to answer may somehow be requited in this Court. And it is not apparent how the seeds which this decision plants in other fields of criminal pleading can well be prevented from sprouting. What is done today calls to mind the trenchant observation made by Mr. Justice Holmes many years ago in *Paraiso* v. *United States*, 207 U. S. 368, 372:

> "The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."

No more so does the Bill of Rights of the United States Constitution "fasten" on this country these primitive notions of the common law.

On the merits these convictions are of course squarely ruled against the petitioners by principles discussed in our recent decisions in the *Barenblatt*, *Wilkinson*, and *Braden* [15] cases, as was all but acknowledged at the bar.

I would affirm.

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[15] 360 U. S. 109; 365 U. S. 399; 365 U. S. 431.